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NO. _____

Supreme Court, U.S.
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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF SOUTH DAKOTA, GEORGE S. MICKELSON, GOVERNOR, ROGER A. TELLINGHUISEN, ATTORNEY GENERAL, JIM JONES, SUPERINTENDENT, HIGHWAY PATROL, IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

ROSEBUD SIOUX TRIBE, CHEYENNE RIVER SIOUX TRIBE, OGLALA SIOUX TRIBE, STANDING ROCK SIOUX TRIBE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL
State of South Dakota
Counsel of Record

John P. Guhin
Deputy Attorney General
Mark Smith
Assistant Attorney General
500 East Capitol
Pierre, SD 57501-5070
Telephone: (605) 773-3215
Counsel for Petitioners

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE STATE OF SOUTH DAKOTA SUCCESSFULLY ASSUMED EXCLUSIVE PUBLIC LAW 280 JURISDICTION OVER INDIANS ON ROADS THROUGH INDIAN COUNTRY IN 1961, WHEN THE JURISDICTION IT TOOK WAS PARTIAL, CONSISTENT WITH WASHINGTON V. CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION?

II

WHETHER THE 1968 AMENDMENTS TO PUBLIC LAW 280, WHICH EXPLICITLY PRESERVED ANY "CESSION" OF JURISDICTION PREVIOUSLY MADE UNDER PUBLIC LAW 280 DEPRIVED THE STATE OF SOUTH DAKOTA OF THE JURISDICTION IT TOOK IN 1961?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, State of South Dakota, George S. Mickelson, Governor, Roger A. Tellinghuisen, Attorney General, Jim Jones, Superintendent, Highway Patrol, in their official capacities, have been parties to this litigation from the beginning.

Petitioners will be referred to as the "State." Respondents, Rosebud Sioux Tribe, Cheyenne River Sioux Tribe, Oglala Sioux Tribe and Standing Rock Sioux Tribe, were parties to the litigation in both the district court and court of appeals. Respondents will be referred to as the "Tribes."

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in Rosebud Sioux Tribe, et al. v. State of South Dakota, et al., was reported at 900 F.2d 1164 (1990), and appears in the Appendix (A-1). The Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc was entered June 8, 1990, and appears in the Appendix (A-45). The opinion of United States District Court for the District of South Dakota, Central Division, is reported at 709 F.Supp. 1502, (D.S.D. 1989) and appears in the Appendix (A-47).

NO. _____

IN THE

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1990

STATE OF SOUTH DAKOTA, GEORGE S. MICKELSON, GOVERNOR, ROGER A. TELLINGHUISEN, ATTORNEY GENERAL, JIM JONES, SUPERINTENDENT, HIGHWAY PATROL, IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

ROSEBUD SIOUX TRIBE, CHEYENNE RIVER SIOUX TRIBE, OGLALA SIOUX TRIBE, STANDING ROCK SIOUX TRIBE,

Respondents.

JURISDICTIONAL STATEMENT

The Judgment of the United States Court of Appeals for the Eighth Circuit was dated and entered March 16, 1990. An "Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc" was entered on June 8, 1990. On August 28, 1990, Justice Blackman

granted an extension for the filing of a Petition for Writ of Certiorari up to and including November 5, 1990. This Petition was filed within that time limitation. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Public Law 280, 67 Stat. 588, §§ 6 and 7 as enacted Aug. 15, 1953.

> SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act. Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

SEC 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislation, obligate and bind the State to assumption thereof.

2. Act of Apr. 11, 1968, PL 90-284, Title IV, § 403, 82 Stat. 79, codified at 25 U.S.C. § 1323.

(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of title 18 of the United States Code, section 1360 of title 28 of the United States Code, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

3. S.D. SL 1961, ch. 464, §§ 1, 4 codified at SDCL 1-1-18; 1-1-21.

> SDCL 1-1-18. The state of South Dakota, in accordance with the provisions of 67 Statutes at Large, page 589 (Public Law 280), hereby assumes and accepts jurisdiction of all criminal offenses and civil causes of action arising in the Indian country located within this state, as Indian country is defined by Title 18 United States Code, section 1151, and obligates and binds this state to the assumption thereof, the provisions of chapter 106 of the Session Laws of the state of South Dakota for 1901, as amended, or any other law of this state to the contrary, notwithstanding.
>
> SDCL 1-1-21. Except as to criminal offenses and civil causes of action arising on any highways, as the term is defined in chapter 31-1, the jurisdiction provided for in § 1-1-18 shall not be deemed assumed or accepted by this state, and §§ 1-1-18 and 1-1-20 shall not be considered in effect, unless and until the Governor of the state of South Dakota, if satisfied that the United States of America has made proper provision for the reimbursement to this state and its counties for the added costs in connection with the assumption of

> said jurisdiction, has issued his proper proclamation duly filed with the secretary of state declaring the said jurisdiction to be assumed and accepted.

STATEMENT OF THE CASE

In 1953, Congress enacted Public Law 280, 67 Stat. 588 (codified in part at 18 U.S.C. § 1162 and 28 U.S.C. § 1360). The first five sections of this enactment effected a mandatory transfer of jurisdiction from the tribes and the federal government over Indian country to the five named States. Sections 6 and 7 of PL 280 constituted an offer to other states to accept civil and criminal jurisdiction over areas of Indian country within the other states. In 1957, South Dakota made its first legislative response to the Congressional offer of jurisdiction. See, S.D. SL 1957, ch. 319 (codified at SDCL 1-1-12 through 1-1-16). These statutes set forth a conditional acceptance of civil and criminal jurisdiction

over Indian country, for it provided for a tribal referendum on the issue of acceptance of State jurisdiction by way of a referendum. All of the Tribes involved in this litigation voted not to accept State jurisdiction within their reservations.

In 1959, the State Legislature enacted S.D. SL 1959, ch. 144 (formally codified at SDC 1960 Supp. § 65.08101). See SDCL 1-1-17. By this statute, the State assumed concurrent police jurisdiction over roads on the reservation which were jointly maintained or established with the United States. In 1961, the Legislature enacted the acceptance of PL 280 jurisdiction which is at issue in this case. S.D. SL 1961, ch. 464, §§ 1, 4 (codified at SDCL 1-1-18 through 1-1-21). The State of South Dakota, by the 1961 Act, accepted jurisdiction over all "criminal offenses and civil causes of action arising on any highways." The acceptance also

allowed the Governor to issue a proclamation assuming all other jurisdiction with Indian country, but only if the Governor was satisfied that the United States had made "proper provision for reimbursement to the State and its counties for the added cost in connection with the assumption of said jurisdiction . . ." SDCL 1-1-21.

From 1961 to 1964, South Dakota did exercise criminal and civil jurisdiction over tribal members on highways in Indian country. In 1964, however, In re Hankins, 125 N.W.2d 839 (S.D. 1964), was decided. Hankins first found, correctly, that South Dakota's acceptance of PL 280 jurisdiction did not require amendment of the South Dakota Constitution, but that acceptance of such jurisdiction could be accomplished by legislation. See South Dakota Constitution, art. XXII, XXVI; In re Hankins, 125 N.W.2d at 841.

The South Dakota Supreme Court also found that Congress intended South Dakota to fall within the provisions of Section 6 of PL 280. In re Hankins, 125 N.W.2d at 842. Further, the Court found that Section 7 did not apply to South Dakota, and that Congress did not authorize states to assume only partial jurisdiction in Indian country. In re Hankins, 125 N.W.2d at 842-843. These findings were erroneous, as established later in Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 494-499 (1979).

In 1963, the Legislature enacted another statute, which took full, unconditional jurisdiction over all Indian country. See S.D. SL 1963, ch. 467; the statute, however, was referred to the voters and defeated and thus never became effective.

In 1968, Congress enacted, as a amendment to the controversial Civil Rights

Act of 1968, amendments to PL 280, which were known as the Indian Civil Rights Act of 1968. 25 U.S.C. § 1323(b) provided that Section 7, the provision of PL 280 which allowed for unilateral assumption of jurisdiction by the states, was hereby repealed; the same section also explicitly provided that the repeal "shall not affect any cession of jurisdiction made pursuant to said section prior to its repeal."

In 1988, the South Dakota Supreme Court decided State v. Onihan, 427 N.W.2d 865 (S.D. 1988), which, relying on Yakima, implicitly overruled Hankins, and specifically determined that South Dakota had successfully taken jurisdiction over Indians on highways in Indian country in 1961, and retained that jurisdiction to the present.

The present action was commenced in federal district court in 1986 by the Rosebud Sioux Tribe. Three other Tribes were allowed

to enter, by stipulation, at the district court level. Jurisdiction was alleged under 28 U.S.C. §§ 1331, 1343(3) and (4), 1337, 1362 and 42 U.S.C. § 1983. The decision of the district court was issued by Chief Judge Donald Porter on March 31, 1989. That decision found that the State of South Dakota had successfully assumed jurisdiction over Indians on highways through Indian country in 1961, and that this jurisdiction was not affected by the 1968 Civil Rights Act amendments. The Tribes filed a Notice of Appeal on April 26, 1989. The State filed a cross-appeal on May 5, 1989, contending that the jurisdiction it had taken was exclusive and not concurrent with the Tribes.

The Eighth Circuit Court of Appeals entered its decision on March 16, 1990. The Circuit Court of Appeals held that the State had not validly assumed jurisdiction in 1961; that the self-government of the Tribe had

become "vested," apparently by the passage of the 1968 amendment; and that it was improper to apply this Court's ruling in Yakima retroactively. The Court of Appeals, on June 8, 1990, denied rehearing and rehearing en banc, although four judges would have granted rehearing.

It should also be noted that, on September 4, 1990, the South Dakota Supreme Court, now relying on the federal law based decision of the Eighth Circuit in this litigation, essentially overruled Onihan, supra. See State v. Spotted Horse, No. 16644, slip op. (S.D. S.Ct. Sept. 4, 1990). The State, on October 29, 1990, filed a Petition for Rehearing and a Motion to be allowed Relief from Default to allow filing of the Petition.

REASONS FOR GRANTING THE WRIT

THE EIGHTH CIRCUIT COURT OF APPEALS HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW IN A WAY THAT CONFLICTS

WITH THE APPLICABLE DECISIONS OF THIS COURT.

A. Introduction.

In 1961, the South Dakota Legislature assumed jurisdiction over Indians on highways through Indian country, S.D. SL 1961, ch. 464, §§ 1, 4, and the State exercised such jurisdiction until 1964 when its own supreme court decided that, as a matter of federal law, a state could not take partial jurisdiction over Indian reservations. In re Hankins, 125 N.W.2d 839 (S.D. 1964).

This Court, in 1979, however, in Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979), determined that a state could, consistent with PL 280, assume partial jurisdiction.

The issue now before the Court is whether the decision of this Court in Yakima will prevail in the State of South Dakota or

whether the earlier, erroneous decision of the South Dakota Supreme Court will be given effect.

The Eighth Circuit Court of Appeals, relying on incorrect notions regarding the effect of the 1968 amendments to PL 280 and ignoring the preservation by Congress of "cessions" of jurisdiction previously made, determined, in effect, that Hankins would be given effect and Yakima would not. The State comes before this Court asking that the Court give effect to Yakima and insure the uniform and national application of federal law, in particular PL 280.

The importance of the case lies not only in the misconstruction of this Court's opinions, as detailed below, but in the tangible result of depriving South Dakota of jurisdiction.

South Dakota's Indian reservations have a highway fatality rate far beyond that of

other state highways. For example, the ten-year averages show that Todd County, on the Rosebud Sioux Reservation, has a highway fatality rate three times that of the state average; Shannon County, on the Pine Ridge Reservation, has a fatality rate in excess of five times the state average. Affidavit of Pat Winters, dated Jan. 6, 1988. The exercise of law enforcement authority by the state on roads through the Indian reservations could, and the State believes would, have the effect of substantially lowering the fatality rate on Indian reservations to a level more consistent with that of the remainder of the State.

Finally, the opinion of the Eighth Circuit clearly puts at issue not only South Dakota's pre-1968 assumption of partial jurisdiction, but also that of Arizona, see Ariz. Rev. Stat. Ann. § 49-561 (air pollution only--water pollution repealed--no offer of

total jurisdiction); Montana, see Mont. Code Ann. §§ 2-1-301, 2-1-302 (criminal jurisdiction only over Flathead Reservation--county veto of full jurisdiction); and Iowa, see Iowa Code Ann. § 1.12-1.14 (civil only over Sac and Fox Indian settlement--no total jurisdiction offered).

B. The Eighth Circuit Court of Appeals misconstrued this Court's opinion in Washington v. Confederated Bands & Tribes of the Yakima Indian Nation when it found that the State of South Dakota could not assume jurisdiction only over highways under PL 280 as enacted in 1953.

In 1953, Congress modified the existing federal/state/tribal jurisdictional arrangements to allow states to unilaterally assume jurisdiction over Indians within Indian country. See Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 codified in part at 18 U.S.C. § 1162 (1988) (PL 280).

Section 7 of PL 280 provided that the State could:

> assume jurisdiction at such time and in such manner as the people of the state shall, by affirmative legislation, obligate and bind the state to assumption thereof.

This Court, in 1979, decided Yakima. As the Eighth Circuit stated correctly:

> Yakima ruled that the Washington jurisdiction statute validly assumed partial jurisdiction under the pre-1968 version of P.L. 280.

Rosebud Sioux Tribe, 900 F.2d at 1168.

Washington had assumed jurisdiction not only over highways through Indian country (the matter at issue here) but, in addition, over compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings and dependent children. Yakima, 439 U.S. at 465 n.1. The Washington statute provided that the state would take total jurisdiction should the Tribe request. The Washington tribes did not request the state to take jurisdiction and, in fact, resisted

the assumption of any jurisdiction by the state.

This Court in Yakima rejected the narrow view of the lower courts with regard to the partial assumption of PL 280 jurisdiction, stating:

> [T]he drafters [of PL 280] were primarily concerned with establishing a general transfer scheme that would facilitate, not impede, future action by other states willing to accept jurisdiction. It is clear that the all-or-nothing approach suggested by the tribe would impede even the most responsible and sensitive jurisdictional arrangements designed by the states.

Yakima, 439 U.S. at 497 (emphasis added).

Notwithstanding the clear direction of this Court in Yakima, the Court of Appeals erroneously held that the South Dakota could not assume partial jurisdiction, that is jurisdiction over Indians on highways through Indian country only, through PL 280, by way of its own statute enacted in 1961.

The Court of Appeals attempted to distinguish Yakima on the grounds that Washington had met the three "major concerns" motivating the passage of PL 280, while South Dakota had not. As stated in the decision of the Court of Appeals:

> The major concerns reflected in the passage of P.L. 280 were (1) to reduce the economic burden of federal jurisdiction over reservations, (2) to respond to a perceived hiatus in law enforcement on reservations, and (3) to assimilate Indians into the general population.

Rosebud Sioux Tribe, 900 F.2d at 1170 (citing Yakima, 439 U.S. at 498).

The Eighth Circuit found, therefore, that the assumption of jurisdiction over highways in South Dakota did little to "reduce the economic burden of federal jurisdiction over reservations since the federal government retains the financial burden of the majority of jurisdictional concerns." Rosebud Sioux Tribe, 900 F.2d at

1171. This conclusion is not correct. The ending of federal jurisdiction over highways means, of course, that vehicular homicide, manslaughter and similar prosecutions would not have to be undertaken by the United States Attorney, the federal courts would not be burdened with such cases, and federal prisons would not be burdened with these prisoners. Likewise, the substantial federal subsidy of tribal police departments to undertake jurisdiction of traffic offenses involving tribal members will not have to occur.[1]

The Court of Appeals also found that South Dakota's assumption of jurisdiction did

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[1]The federal subsidy of tribal police departments alone for traffic enforcement by three of the four Plaintiff Tribes is estimated at approximately $850,000. (Estimate of the State drawn from Answers to Interrogatories of three of four Plaintiff Tribes.)

not "respond to a perceived hiatus in law enforcement," the second Yakima factor, in that it did not "go very far in reducing lawlessness on reservations but simply introduced a third party to "the already complex jurisdiction pattern on reservations." Rosebud Sioux Tribe, 900 F.2d at 1170.

Again, the finding is neither helpful nor correct. Except for matters involving juvenile delinquency, the State of Washington took no more criminal jurisdiction than did South Dakota, yet this Court had no hesitation about finding its action consistent with PL 280 in Yakima.

Furthermore, the exercise of jurisdiction over Indians on roads through the reservations will, in fact, go a great distance toward reducing lawlessness, especially lawlessness which creates great danger to Indians and non-Indians alike. As

set forth above, the fatality rate for the reservation roads is two to five times the state average as evidence by the analysis of ten years of statistics. See Affidavit of Pat Winters.

Finally, South Dakota does not seek to introduce a "third party" to the reservation roads. As the Eighth Circuit must understand, South Dakota possesses and will continue to possess jurisdiction over non-Indians for certain offenses on the roads through reservations, regardless of the outcome of this litigation. See Solem v. Bartlett, 465 U.S. 463, 465 (1984); United States v. McBratney, 104 U.S. 621 (1892). (As to non-member Indians, see Duro v. Reina, ___ U.S. ___, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990)). By approving South Dakota's assumption of jurisdiction on roads through reservations, the role of the second and

third parties, i.e. the federal government and the Tribes, will be eliminated.

The Eighth Circuit apparently did agree agree that South Dakota's assumption of highway jurisdiction responded to the third concern of Yakima to "assimilate Indians to the general population." Rosebud Sioux Tribe, 900 F.2d at 1170. Indeed, South Dakota's assumption of jurisdiction was much less intrusive than that of Washington. Washington inserted itself into, for example, domestic relations and juvenile delinquency, adoption proceedings and dependent children, even though these concerns are at the heart of Indian culture. See, e.g., Indian Child Welfare Act, 1978, 25 U.S.C. § 1901-1963; Mississippi Bands of Choctaw Indians v. Holyfield, ___ U.S. ___, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). Thus, the concerns of Yakima regarding the purposes of PL 280 were

all easily met in terms of the Yakima case itself.

Finally, the Eighth Circuit Court of Appeals objected to South Dakota's assumption of jurisdiction because South Dakota did not simultaneously offer to take total jurisdiction over all Indian country and all Indians as did Washington. The Eighth Circuit apparently ignored the fact that South Dakota, just four years before the 1961 assumption of partial jurisdiction, had allowed each of the Tribes to veto any assumption of state jurisdiction under a previous PL 280 enactment, see S.D. SL 1957, ch. 319, and that all the Tribes did exercise just such a veto. The functional equivalent of the Washington arrangement was surely achieved. The Eighth Circuit Court of Appeals, therefore, takes a mechanistic view of this Court's decision in Yakima, apparently believing that only an arrangement

which precisely follows Washington's is satisfactory. What this Court found, of course, was that there would be "responsible and sensitive jurisdictional arrangements designed by the states." Yakima, 439 U.S. at 497 (emphasis added). This clearly leaves the door open for arrangements other than those designed by the State of Washington.

In sum, the Eighth Circuit Court of Appeals' decision is in direct conflict with Washington v. Yakima Indian Nation.

C. The Eighth Circuit Court wrongly determined in effect that the State could, prior to 1968, retrocede jurisdiction to the tribe and federal government by means of an erroneous state court decision.

As noted above, the South Dakota Legislature in 1961 assumed jurisdiction over Indians on highways through Indian country.

In 1964, the South Dakota Supreme Court, misreading federal law determined that a state legislature could not take partial

jurisdiction over Indian country. In re Hankins, 125 N.W.2d 839 (S.D. 1964). The state court Hankins decision was, in the State's view, proven wrong in Yakima in 1979. Nonetheless the Eighth Circuit opinion has in effect allowed the erroneous state court decision to control an important question of federal law rather than the later definitive decision of this Court in Yakima.

In Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877, 886 (1968), this Court said:

> As originally enacted, Pub. L. 280 plainly contemplated that, if States chose to extend state court jurisdiction over causes of action arising in Indian country, they would be required to honor that commitment, for the Act made no provision for States to return any jurisdiction to the United States.

Thus, South Dakota could not have deliberately surrendered jurisdiction to the United States prior to the enactment of the 1968 amendments because there was no

provision in the existing law to allow this action.

If South Dakota was not able, as a matter of federal law, to intentionally, through legislation, abandon highway jurisdiction, such result could certainly not occur by virtue of an erroneous state supreme court decision such as occurred in Hankins, as the Eighth Circuit in effect found.[2]

In sum, the decision of the Circuit Court both disregards the principal of stare decisis and the intent and effect of the supremacy clause of the United States constitution.

D. Section 7 of the Indian Civil Rights Act did not deprive South Dakota of

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[2]Of course, in 1968, Congress did provide, for the first time, for a mechanism for retrocession and for acceptance of retrocession. 25 U.S.C. § 1323(b). There is no claim of retrocession under this law; indeed, the Tribes have disclaimed any such argument.

jurisdiction when the language states that it did not affect "any cession" previously made.

In 1968, Congress amended PL 280 to require tribal consent to any future assumption of jurisdiction by the states. In so doing, Congress explicitly preserved "cessions" of jurisdiction already made to the states. The 1968 amendment flatly states that repeal of the relevant sections of PL 280:

> shall not affect any cession of jurisdiction made pursuant to said section prior to its repeal.

Act of Apr. 11, 1968, 82 Stat. 73, 79 (codified at 25 U.S.C. § 1323(b)).

The language of the Act is clear and unmistakable. If a "cession" had been made prior to the act, it was preserved.

In South Dakota's case, the "cession" had been accomplished by the federal government to the state in 1961 when the State Legislature adopted S.D. SL 1961,

ch. 464, which was effective on July 1, 1961. This act of cession was, therefore, on the face of 25 U.S.C. § 1323(b), preserved.

The opinion of the Court of Appeals ignores the language of Congress that the 1968 action did not "affect any cession of jurisdiction" made prior to 1968. Indeed, although this language has clear and direct application to South Dakota's situation, and even though it contains a term of law, i.e., "cession," the Eighth Circuit fails even to quote it.

Instead, the Court of Appeals engaged in a hunt for legislative history to justify ignoring the clear statutory language and to buttress its eventual finding about the "intent" of Congress in enacting the 1968 amendments to PL 280. When the language of Congress is clear and the plain meaning of statutes "is apparent," however, there need be no search of the legislative history.

See, e.g., Caminetti v. United States, 243 U.S. 470, 485 (1917).

Moreover, the Circuit Court's digression violates the analytical structure of Yakima itself. An issue in Yakima was whether the State of Washington was required to amend its constitution before assuming any PL 280 jurisdiction under the 1953 act. A congressman from Washington stated in committee that Washington did, in fact, have a "constitution there that requires this amendment in order that they can get at this." See Brief for the United States as Amicus Curiae, Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, No. 77-388 at 26 (quoting H.R. Rep. No. 848, 83d Cong., 1st Sess. at 26 (1953)). The Senate sponsor of the Bill, Senator Case, agreed on the record. Id. at 28 (citing 99 Cong. Rec. 10782 (1953)). Nonetheless, this Court found:

> While some committee members apparently thought that Section 6 states, as a matter of state law, would have to amend their constitutions in order to remove the disclaimer found there, there is no indication that the committee intended to impose any such requirement.

Washington v. Yakima Indian Nation, 439 U.S. at 492-493.

This Court has thus warned the lower courts of the vice of relying upon isolated statements of congressmen, even congressmen from the directly affected state, as setting the national policy with regard to the interpretation of PL 280. Yet, that is exactly what the Eighth Circuit did here.

More particularly, the Eighth Circuit Court of Appeals relied upon a statement of a congressman who was, indeed, not even a sponsor of the bill, Congressman Reifel. This statement is worth even less than that of the Washington congressman because the committee statement of Reifel does not even

directly address the issue of whether South Dakota had successfully assumed partial jurisdiction in 1961. A fair reading of the statement relied upon indicates that it speaks only of action of the South Dakota Legislature in 1963 taking total jurisdiction, and the subsequent action of the electorate in 1964 overturning the 1963 Act, and not the 1961 assumption of partial jurisdiction. See Hearings on H.R. Res. 1100 Before the Committee on Rules of the House of Representatives, 90th Cong., 2d Sess. Part 2, 35-36 (1968). In fact, Congressman Reifel did not even mention the assumption of partial jurisdiction in 1961.

It was therefore singularly inappropriate for the Court of Appeals to give weight to this statement for not only does it not demonstrate the intention of Congress, it does not even demonstrate the

perception of Congressman Reifel itself as to the issue now before the Court.[3]

The State concludes that the Circuit Court committed clear error when it declined to give effect to the plain words of Section 7 of the 1968 amendments explicitly preserving prior "cessions" of jurisdiction to the states, and instead relied upon flimsy

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[3]The court also cited a statement of a South Dakota Assistant Attorney General made before a congressional committee in 1965, three years before passage of the bill in question. The comment was never made a part of any official report. See Rosebud Sioux Tribe, 900 F.2d at 1171. It is also of at least passing historical interest the Indian Civil Rights Act was, essentially, tacked on to another civil rights bill to which still another civil rights amendment had been added. See ____ Cong. Rec. 9566 (Apr. 10, 1968). On the day Reifel made the statement relief upon by the Eighth Circuit, Dr. Martin Luther King was assassinated. Six days later, when the nation was enduring riots and when troops were stationed "throughout and around the Capitol Building," the statute was passed. See ____ Cong. Rec. 9566 (Apr. 10, 1968).

legislative history to fashion an elusive congressional "intent."

E. The Eighth Circuit Court of Appeals misconstrued the retroactivity decisions of this Court and thus disrupted the uniform application of federal law on a permanent basis.

The "usual rule" is that decisions of this Court on federal law issues are retroactive. See Goodman v. Lukens Steel Co., 482 U.S. 656, 662 (1987).

Departures from this rule are appropriately countenanced only to protect private rights. Thus, for example, in Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940), this Court held that a determination of a statute's unconstitutionality would not be applied retroactively so as to deprive bond holders of their rights. At the same time, the ultimate decision regarding unconstitutionality of the statute was not itself affected. See also Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

The clear direction of this Court, the State suggests, is set out in United States v. Estate of Donnelly, 397 U.S. 286, 294 (1970), in which this Court stated:

> Acts of Congress are generally to be applied uniformly throughout the country from the date of their effectiveness onward. . . . Deviant rulings by circuit courts of appeals [and, the State suggests, state supreme courts] cannot generally provide the 'justified reliance' necessary to warrant withholding retroapplication of a decision construing a statute as Congress intended it. In rare cases, decisions construing federal statutes might be denied full retroactivity, as for instance when this Court overrules its own construction of a statute . . .

See also Chesapeake and Ohio Railway Co. v. Martin, 283 U.S. 209 (1931). Despite this direction, the Court of Appeals nonetheless refused to apply this Court's decision in Washington v. Yakima Indian Nation, supra, retroactively. In essence, the Court of Appeals has allowed the erroneous state court

decision in Hankins in 1964 to control over this Court's decision in Yakima in 1979.

Moreover, contrary to the rule of this Court, the question here (1) disrupts the uniform application of federal law, and (2) does so on a permanent basis, thus permanently and erroneously allocating power between the States and the Tribes.

The Eighth Circuit Court of Appeals, in refusing to grant retroactivity to Yakima, stated that to do so would disturb the "vested rights" of the parties, would frustrate the "justifiable expectations of the parties," and that further, it would be "inequitable" to do so.

Of course the only "vested" right at issue is that of the State of South Dakota. As set forth above, Section 7 of the 1968 Indian Civil Rights Act preserved "cessions" of jurisdiction made prior to 1968. Because South Dakota had been the recipient of such

"cession," Congress unambiguously "vested" that right in the State in 1968.

The grounds for the purported "vested right" of the Tribes are, in contrast, exceedingly vague. The Eighth Circuit's opinion admits that there is "no vested right to a judicial decision." Rosebud Sioux Tribe, 900 F.2d at 1173 (citing United States v. Estate of Donnelly, 397 U.S. 286, 295 (1970)). This is especially true, the State submits, of an erroneous judicial decision.

While denying that the purported "vested right" of the Tribes flows from the erroneous Hankins decision, the Circuit Court nonetheless argues that such a right flows "from the change in Congress' offer of jurisdiction to the states." Rosebud Sioux Tribe, 900 F.2d at 1173. This surely is bootstrapping. In the absence of Hankins, there would have been no grounds whatsoever for the Eighth Circuit's decision.

Moreover, contrary to the view of the Circuit Court, the Tribes do not have a "justifiable expectation" protectable by federal law in the erroneous decision of the South Dakota Supreme Court in Hankins. It will be recalled that Hankins was decided in 1964. The Yakima case was decided in 1979. The very next year, South Dakota argued the applicability of Yakima in a case which was ultimately decided upon a different issue.

Whatever the "justifiable expectation" doctrine is, it does not protect expectations built up over a mere fifteen-year period in which a state government merely declines to defy the courts. The case is thus markedly distinguishable from those cited by the Eighth Circuit Court of Appeals. (There was, for example, a seventy-year period relied upon in Rosebud Sioux Tribe v. Kneip, 439 U.S. 584 (1977).)

The Eighth Circuit further appeared to argue that it is simply not "equitable" to give this Court's Yakima decision retroactive effect. See Rosebud Sioux Tribe, 900 F.2d at 1173. The decisive point with regard to "equitability," however, is that the fatality rate on reservation highways far exceeds that on non-reservation highways in the State. The ten-year fatality rate in Todd County of the Rosebud Reservation is over three times the state average; the ten-year fatality rate in Shannon County of the Pine Ridge Reservation is over the five times the state average. Affidavit of Pat Winters, dated Jan. 6, 1988. Likewise, in examining the equation it should be remembered that the jurisdiction taken by the State was limited. Only jurisdiction over highways was taken. The jurisdiction taken does not go to the heart of the tribal culture or way of life, but rather provides protection for Indians

and non-Indians alike on reservation highways. The opinion of the Eighth Circuit Court of Appeals appears to take the view that any assumption of jurisdiction is crippling to the Tribes, a stance clearly not supported by any evidence nor by Yakima itself. Surely it is not "inequitable" to give retroactive application to the decisions of this Court to provide for the safety of roads on the reservations, while preserving the heart of Indian culture and way of life.

The State submits that this Court should review the failure of the Eighth Circuit to grant retroactivity to this Court's decision in Yakima.

F. The state's assumption of jurisdiction in 1961 over Indians on highways in Indian country was exclusive and not concurrent.

The district court found that South Dakota's assumption of jurisdiction over highways was concurrent with the Tribes and

not exclusive. The Eighth Circuit Court of Appeals essentially did not rule directly on that point, for it found that the State had no jurisdiction over Indians on highways on the reservations. See Rosebud Sioux Tribe, 900 F.2d at 1171 n.12.

The issue, therefore, is whether the State's assumption of jurisdiction in 1961 was exclusive of tribal and federal jurisdiction, or was concurrent with the Tribe and the State.

First, PL 280 allowed the State to take civil and criminal jurisdiction "at such time and in such manner as the State" determined. South Dakota clearly intended to take all highway jurisdiction. See S.D. SL 1961, ch. 464, § 1, stating that jurisdiction was taken of "all" criminal and civil causes of action.

Second, assumption of exclusive jurisdiction is consistent with the three

main purposes of PL 280, which were: (1) to reduce the economic burden of federal jurisdiction over reservations, (2) to respond to a perceived hiatus in law enforcement on reservations, and (3) to assimilate Indians into the general population. Rosebud Sioux Tribe, 900 F.2d at 1170 (citing Yakima, 439 U.S. at 498).

It is clear beyond any argument that the assumption of exclusive rather than concurrent jurisdiction would clearly reduce the economic burden on the United States. Clearly, if concurrent jurisdiction exists, the United States will remain responsible for substantial highway expenditures, either in its own behalf or by way of the subsidization of tribal police departments for operation on highways through reservations.

Second, the law enforcement hiatus is more effectively addressed by exclusive jurisdiction because allowing concurrent

tribal enforcement simply introduces a possibility of conflict between the State and the Tribes, and produces a "complex jurisdictional pattern on reservations," Rosebud Sioux Tribe, 900 F.2d at 1170 (footnote omitted), where it is simply unnecessary to do so. Finally, by eliminating conflicts with regard to jurisdiction on the roads, the policy of assimilation is more easily accomplished.

It is of note that the legislative history of PL 280 supports the thesis that Congress intended jurisdiction to be taken by the State to be exclusive. The committee discussion classified the jurisdiction that the states were to take as "exclusive." See Hearings on H.R. 1063 Before the Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. at 107 (July 15, 1953). Critically the discussion of the same committee indicated directly that the jurisdiction of the Indian

tribes themselves was to be affected. Certain tribes expressed a desire to retain jurisdiction and to maintain their own law and order systems after the passage of PL 280. An exception was made for these tribes. When the committee discussed the matter, it was recognized that the tribes which were not included within any exception would not be able to maintain their own law and order system. Counsel for the committee stated:

> I do not think it would require any [adjustments], except in the short title of the bill, provided that Congress were agreeable to keeping in the provisions for those exceptions which this bill reflects for those states where certain Indian tribes wish not to have a cession of civil and criminal jurisdiction to the state but to maintain their own law and order system.

1953 Hearings on H.R. 1063 Before the Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. at 96 (June 29, 1953)

(emphasis added). At this point Congressman D'Ewart asked if a list of states was available to which the law would be applicable. Counsel replied, naming certain states, then saying:

> In Oregon there is a recommendation for Warm Springs, in Minnesota for Red Lake; in Wisconsin for Menominee, and in Nebraska, as in the case of California and Nevada, there would be no reservation which the Department would recommend be held out as one permitted to administer its own law and order system.

Id. at 97 (emphasis added).

The committee thus recognized that if a particular tribe was not named as an exception it would not be permitted to "administer its own law and order system" after enactment of PL 280. Finally, the legislative history, by referring to such matters as "school truancy laws [which] do not apply on any reservations," id. at 100, indicates that the tribe was not to retain

any jurisdiction. Congress wanted to give the states the authority to compel children to go to school and was concerned about the possibility of inconsistent tribal legislation. To overcome any such problem, Congress intended state jurisdiction to be exclusive of tribal jurisdiction to facilitate elimination of this and similar problems of enforcement of civil and criminal laws.[4]

In sum, South Dakota intended and Congress allowed the State to assume exclusive, rather than merely concurrent,

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[4] See also H.R. Rep. No. 91-1545, reprinted at 1970 U.S. Code Cong. and Leg. News 4783, 4786, which explicitly recognized that no jurisdiction was retained in the tribes when jurisdiction was assumed under PL 280; S. Rep. No. 95-719, 95th Cong., 2d Sess., reprinted at 1978 U.S. Code Cong. and Ad. News 1761, 1767, which establishes that the Pascua Yaqui Tribe was to be treated as a PL 280 tribe and also that it was to have no civil or criminal jurisdiction.

jurisdiction over civil and criminal causes of action arising on highways through Indian country under PL 280 and South Dakota's implementation of PL 280 in 1961.

CONCLUSION

This Court, in the Yakima case, found that a state could assume partial jurisdiction over Indian country, and in particular, that a state could assume jurisdiction over highways through Indian reservations. The Eighth Circuit Court of Appeals has declined to give retroactive effect to that decision and, in effect, has declared that the erroneous decision of the South Dakota Supreme Court in 1964 sets the boundaries of federal law and permanently allocates power between the Tribes and the State, despite the intervening decision of the United States Supreme Court. This case presents an important question of federal/tribal/state relations and should be

addressed by this Court. The State of South Dakota respectfully requests that this Petition for Writ of Certiorari be granted.

90-749

NOV 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF SOUTH DAKOTA, GEORGE S. MICKELSON, GOVERNOR, ROGER A. TELLINGHUISEN, ATTORNEY GENERAL, JIM JONES, SUPERINTENDENT, HIGHWAY PATROL, IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

ROSEBUD SIOUX TRIBE, CHEYENNE RIVER SIOUX TRIBE, OGLALA SIOUX TRIBE, STANDING ROCK SIOUX TRIBE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL
State of South Dakota
Counsel of Record

John P. Guhin
Deputy Attorney General
Mark Smith
Assistant Attorney General
500 East Capitol
Pierre, SD 57501-5070
Telephone: (605) 773-3215
Counsel for Petitioners

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-5227

Rosebud Sioux Tribe, Appellant, Cheyenne River Sioux Tribe, Intervenor, Oglala Sioux Tribe, Standing Rock Sioux Tribe, Appellants, v. State of South Dakota; George S. Mickelson, Governor; Roger Tellinghuisen, Attorney General; Jim Jones, Superintendent of the Highway Patrol, In Their Official Capacities, Appellees.	*	Appeals from the United States District Court for the District of South Dakota.

No. 89-5228

Rosebud Sioux Tribe, *
*
Cheyenne River Sioux *
Tribe, *
*
Appellant, *
*
Oglala Sioux Tribe and *
Standing Rock Sioux *
Tribe, *
*
Intervenors- *
Plaintiffs Below, *
*
v. *
*
State of South Dakota; *
George S. Mickelson, *
Governor; Roger *
Tellinghuisen, Attorney *
General; Jim Jones, *
Superintendent of the *
Highway Patrol, In Their *
Official Capacities, *
*
Appellees. *

No. 89-5252

Rosebud Sioux Tribe, *
*
Appellee, *
*
Cheyenne River Sioux *
Tribe, Oglala Sioux *
Tribe, and Standing Rock *
Sioux Tribe, *
*

(Plaintiff/ Intervenors Below) Appellees,

v.

State of South Dakota; George S. Mickelson, Governor; Roger Tellinghuisen, Attorney General; Jim Jones, Superintendent of the Highway Patrol, In Their Official Capacities,

Appellants.

Submitted: October 13, 1989

Filed: March 16, 1990

Before LAY, Chief Judge, McMILLIAN and WOLLMAN, Circuit Judges.

LAY, Chief Judge.

This action was originally commenced by the Rosebud Sioux Tribe, later joined by the Cheyenne River Sioux Tribe, the Oglala Sioux Tribe and the Standing Rock Sioux Tribe (the Tribes), to enjoin the State of South Dakota from exercising civil and criminal

jurisdiction over highways running through Indian land[1] in the state. The district court[2] upheld the state's assertion of

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[1]While the terms "Indian land" or "reservation" are used to identify the geographic area of jurisdiction, the more accurate term is "Indian country," defined as:

> Except as otherwise provided in sections 1154 and 1156 of this title the term "Indian country", as used in this chapter means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1988).

[2]The Honorable Donald Porter, United States District Judge for the District of South Dakota.

jurisdiction. The Tribes have appealed; the state has cross-appealed the district court's finding that its jurisdiction is concurrent with tribal authorities. We find the district court erred. Absent tribal consent, we hold the State of South Dakota has no jurisdiction over the highways running through Indian lands in the state. We reverse and remand to the district court to enter judgment in favor of the Tribes.

BACKGROUND

When South Dakota was admitted to the Union, an act of Congress required a disclaimer of jurisdiction over Indian land be included in the state constitution:

> [T]he people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States,

> the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676. See also S.D. Const. art. XXII; id., art. XXVI, § 18.[3] In 1953, Congress modified the federal-tribal scheme of jurisdiction over Indian land to allow states to assume jurisdiction over Indians within the state. See Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, codified in part at 18 U.S.C. § 1162 (1988) (PL 280). While PL 280 allowed an express, immediate cession of jurisdiction to

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[3]Similar disclaimers were adopted in the state constitutions of Washington, Montana, North Dakota, Utah, Oklahoma, Arizona, and New Mexico as a condition of their admittance to the Union. See Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 479 & n.23 (1979).

some states, see 18 U.S.C. § 1162(a),[4] other states fell within the provisions of sections 6 and 7 of PL 280, which provided the option of assuming jurisdiction. Section 7 of PL 280 provided:

> The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both as provided for in the Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislation, obligate and bind the State to assumption thereof.

PL 280, § 7, 67 Stat. 588, 589, repealed by Act of Apr. 11, 1968, Pub. L. 90-284, § 403, Title IV, 82 Stat. 73, 79.

South Dakota responded to the congressional offer of jurisdiction in 1957

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[4] California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska were the "mandatory" states to which jurisdiction was immediately ceded. See 18 U.S.C. § 1162.

with legislation accepting criminal and civil jurisdiction if the affected Tribes consented. See S.D. Codified Laws Ann. §§ 1-1-12 - 16 (1985). Since tribal consent was not given, jurisdiction was never assumed under this law. In 1959, South Dakota enacted a statute assuming jurisdiction over highways jointly maintained with the federal government. See S.D. Codified Laws Ann. § 1-1-17. The prerequisite to assumption of jurisdiction in this statute, that the roads be jointly maintained by the state and federal government, was never met. Thus, these statutes, which appear in the current codification of South Dakota's statutes,[5]

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[5]The commentary following section 1-1-12 notes that these statutes are not repealed but possibly viable: "The case of Washington v. Confederated Bands and Tribes of Yakima Indian Nation, * * * may change one or more of the interpretations of these statutes, so

(Footnote Continued)

remain imperative. See In re High Pine, 78 S.D. 121, 99 N.W.2d 38 (1959).

In 1961, South Dakota enacted the legislation that is at issue in this case. This legislation accepted all civil and criminal jurisdiction, conditioned on federal reimbursement, with a notable exception:

> The state of South Dakota, in accordance with the provisions of 67 Statutes at Large, page 589 (Public Law 280), hereby assumes and accepts jurisdiction of all criminal offenses and civil causes of action arising in the Indian country located within this state, as Indian country is defined by Title 18 United States Code, section 1151, and obligates and binds this state to the assumption thereof[.]
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> * * * *
>
> Except as to criminal offenses and civil causes of action arising on any highways, as the term is defined in chapter 31-1, the

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(Footnote Continued)
they are being reprinted until further disposition is made of them." S.D. Codified Laws Ann. § 1-1-12, Commission Note.

> jurisdiction provided for in § 1-1-18 shall not be deemed assumed or accepted by this state, * * * unless and until the Governor of the state of South Dakota, if satisfied that the United States of America has made proper provision for the reimbursement to this state and its counties for the added costs in connection with the assumption of said jurisdiction, has issued his proper proclamation duly filed with the secretary of state declaring the said jurisdiction to be assumed and accepted.

S.D. Codified Laws Ann. §§ 1-1-18, 1-1-21 (1985) (emphasis added) (1961 legislation). The general assumption of jurisdiction did not occur since the Governor of South Dakota never filed the required proclamation. A subsequent attempt in 1963 to assume complete civil and criminal jurisdiction without the federal reimbursement condition failed when the legislation was defeated in a referendum vote. See Act of Mar. 15, 1963, Ch. 467, 1963 S.D. Laws 522; S.D. Codified Laws Ann. § 1-1-12 Commission Note (1985) (chapter 467

defeated in referendum vote by 3 to 1 margin).

The exception in the 1961 legislation purportedly allowed the state to exercise jurisdiction over highways in Indian country from 1961 forward. In 1964, however, the South Dakota Supreme Court invalidated the 1961 legislation. See In re Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964). The court concluded the state's assumption of highway jurisdiction did not effectively remove the constitutional disclaimer because PL 280 did not permit a state to assume partial subject-matter jurisdiction. Id. at 442-43, 125 N.W.2d at 842-43. The 1961 legislation was never repealed but appears in the current official codification of the state laws. The state did not pursue highway enforcement efforts after the Hankins decision, and judicial decisions reflected the state's lack of jurisdiction over Indians on Indian land.

See, e.g., State v. Molash, 86 S.D. 558, 199 N.W.2d 591 (1972); Smith v. Temple, 82 S.D. 650, 152 N.W.2d 547 (1967).

In 1968 Congress amended PL 280 to require tribal consent prior to any assumptions of jurisdiction. The pertinent language of the 1968 amendment reads as follows:

> The consent of the United States is hereby given to any State not having jurisdiction over [civil or criminal causes of action] in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over [civil or criminal causes of action] as may be determined by such State to the same extent that such State has jurisdiction over [other civil or criminal causes of action] * * *
>
> * * * *
>
> SEC. 403 (a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by

> such State pursuant to [PL 280], as it was in effect prior to its repeal by subsection (b) of this section.
>
> (b) Section 7 of [PL 280] is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

Act of Apr. 11, 1968, Pub. L. 90-284, Title IV, §§ 401-03, 82 Stat. 73, 78-79 (codified at 25 U.S.C. §§ 1321(a), 1322(a), 1323 (1982)) (emphasis added). The tribal consent requirement did not apply to states that had assumed jurisdiction prior to the repeal of section 7. See Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138, 150 (1984).

In 1979 the United States Supreme Court decided Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979). Yakima ruled that the Washington jurisdiction statute validly assumed partial jurisdiction under the pre-1968 version of

PL 280. After Yakima, South Dakota began urging in state courts that it had validly assumed highway jurisdiction in the 1961 legislation. The 1961 legislation reappeared in the 1985 codification of state laws in response to Yakima.[6] The South Dakota Supreme Court in State v. Onihan, 427 N.W.2d 365 (S.D. 1988) ruled that, in light of Yakima, Hankins was overruled; the court then concluded that the 1961 legislation was a valid assumption of jurisdiction over highways in Indian land. Onihan, 427 N.W.2d at 367-68. The Onihan court also found the 1968 tribal consent amendment did not apply since the state had validly assumed jurisdiction prior to the amendment. Id. at 367.

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[6]The 1961 legislation was not included in the 1974 codification of state laws.

The Tribes filed this action in federal district court on May 14, 1986, seeking declaratory and injunctive relief restraining the state from exercising jurisdiction over highways on Indian land. The parties filed cross-motions for summary judgment. The district court denied the Tribes' motion, and granted summary judgment in favor of the state. The district court concluded the state validly assumed highway jurisdiction in 1961 and that the 1968 amendment did not apply to the state. Rosebud Sioux Tribe v. South Dakota, 709 F. Supp. 1502 (D.S.D. 1989). The Tribes now appeal.

DISCUSSION

The question before this court is whether South Dakota currently has civil and criminal jurisdiction over highways running through Indian land in the state. The fundamental issue is whether the state, which began re-asserting its jurisdiction over the

highways after the 1979 Yakima decision, is bound by the 1968 amendment requiring consent of the affected Tribes. The Tribes argue that in 1968, when PL 280 was amended, the state did not have PL 280 jurisdiction and consequently was bound by the amendment. The Tribes rely principally on the statements and representations made by representatives of South Dakota before congressional committees considering the PL 280 amendments which suggest South Dakota had not assumed jurisdiction under the pre-amendment version of PL 280. The Tribes contend Congress relied on those representations and intended South Dakota be bound by the tribal consent amendment.

The state contends it is not bound by the 1968 amendment, arguing that it never lost the jurisdiction obtained in the 1961 legislation. The state advances two arguments to support this theory. First,

PL 280 as originally enacted did not provide for a method by which states could retrocede, or give back, the jurisdiction assumed. Once South Dakota assumed jurisdiction, the state argues it could not lose it, notwithstanding the Hankins decision. Second, the state contends the only consistent resolution of this case is to find it validly assumed jurisdiction in 1961. To rule otherwise would be an implicit adoption of Hankins, which was overruled by Yakima and Onihan.

The district court, although distinguishing between the Washington jurisdiction statute in Yakima and South Dakota's statute, nonetheless found "it best to defer to the implicit holding of the South Dakota Supreme Court in State v. Onihan that the 1961 legislation remains an effective state statute notwithstanding its checkered history." Rosebud Sioux Tribe, 709 F. Supp. at 1509 (citations omitted). In doing so the

district court noted that Hankins was wrongly decided and that the 1961 legislation was a sufficient "affirmative legislative action" of the state to allow assumption of PL 280 jurisdiction. Id. at 1510-12. On this basis the district court concluded that the 1968 tribal consent requirement was not applicable. Id. at 1513.

The validity of the state's jurisdiction presents difficult questions due to the unique sequence of events in this case. The Onihan court concluded that Hankins was essentially overruled by Yakima. We recognize the South Dakota Supreme Court's prerogative to declare its earlier decisions overruled, invalid or no longer possessing binding effect. However, were a state court's ruling is affected by its interpretation of federal law, this court may conduct a de novo review of that interpretation. See Three Affiliated Tribes,

467 U.S. at 153-54 (federal court can review state court decision influenced by its understanding of federal law).

It is important to distinguish between the state and federal law issues facing the Onihan court. The state law question concerns procedural compliance with PL 280, i.e., the procedure for removing a constitutional disclaimer. See, e.g., S.D. Const. art. XXII; see Yakima, 439 U.S. at 493 (procedure for removing disclaimers is state law issue). The federal law question considers substantive compliance with PL 280, i.e., is the jurisdiction statute sufficient to accept Congress' offer of jurisdiction over Indians. The Onihan court addressed both issues in its decision. That court considered the remaining validity of Hankins in light of Yakima, overruled its prior decision, and then, applying Yakima retroactively, concluded that the 1961

legislation complied with the substantive requirements of PL 280. Onihan, 427 N.W.2d at 367-68. We address the issue of the substantive validity of the state's assertion of jurisdiction since it is for the federal court to determine whether a state's legislation complies with the federal requirements of PL 280. See, e.g., Tyndall v. Gunter, 840 F.2d 617, 618 (8th Cir. 1988) (validity of retrocession of PL 280 jurisdiction is a federal law question); Omaha Tribe of Nebraska v. Village of Walthill, 334 F. Supp. 823, 831 (D. Neb. 1971) (validity of state resolution retroceding PL 280 jurisdiction considered under federal law), aff'd, 460 F.2d 1327 (8th Cir. 1972).

The South Dakota Supreme Court misinterpreted Yakima as controlling, and thus overruling its earlier decisions holding the state did not have PL 280 jurisdiction.

We find error in this interpretation of Yakima. The differences between Washington's jurisdiction scheme and South Dakota's single subject-matter jurisdiction scheme require a more searching examination. Washington's statute assumed jurisdiction over eight different subject-matter areas,[7] and left open the possibility of full jurisdiction

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[7] See Yakima, 439 U.S. at 475-76:

> Full criminal and civil jurisdiction to the extent permitted by Pub. L. 280 was extended to all fee lands in every Indian reservation and to trust and allotted lands therein when non-Indians were involved. Except for eight categories of law, however, state jurisdiction was not extended to Indians on allotted and trust lands unless the affected tribe so requested. The eight jurisdictional categories of state law that were thus extended to all parts of every Indian reservation were in the areas of compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and motor vehicles.

with the consent of the affected Tribe. The Yakima court found the state could "assume jurisdiction in such manner" as the people of the state shall "by affirmative legislative action, obligate and bind the State to assumption thereof." Yakima, 439 U.S. at 495. The court also observed: "Whether or not "[sic] in such manner"[sic] is fully synonymous with "[sic] to such extent,"[sic] the phrase is at least broad enough to authorize a State to condition the extension of full jurisdiction over an Indian reservation on the consent of the tribe affected." Id. at 498 (emphasis added).

The Yakima court concluded that Washington's jurisdiction statute did not represent "an attempt to reap the benefits and to avoid the burdens of the jurisdictional offer made by Congress." Id. at 498. As Yakima points out proof to the contrary was found in the state's offer to

assume total jurisdiction whenever a tribal request is made that it do so.[8] Washington's

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[8]The Supreme Court expanded on this theme by observing:

> [T]he partial geographic and subject-matter jurisdiction that exists in the absence of tribal consent is responsive to the law enforcement concerns that underlay the adoption of Pub. L. 280. State jurisdiction is complete as to all non-Indians on reservations and is also complete as to Indians on nontrust lands. The law enforcement hiatus that preoccupied the 83d Congress has to that extent been eliminated. On trust and restricted lands within the reservations whose tribes have not requested the coverage of state law, jurisdiction over crimes by Indians is, as it was when Pub. L. 280 was enacted, shared by the tribal and Federal Governments. To the extent that this shared federal and tribal responsibility is inadequate to preserve law and order, the tribes need only request and they will receive the protection of state law.
>
> * * * *
>
> We are unable to conclude that the State, in asserting a less intrusive presence on the Reservation while at the

(Footnote Continued)

scheme was responsive to the congressional concerns and intent that fostered PL 280 and left "substantial play for tribal self-government" in a way that "reflects a responsible attempt to accommodate the needs of both Indians and non-Indians within a reservation." Id. at 499.

In contrast, South Dakota's jurisdiction scheme assumes civil and criminal

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(Footnote Continued)

> same time obligating itself to assume full jurisdictional responsibility upon request, somehow flouted the will of Congress. A State that has accepted the jurisdictional offer in Pub. L. 280 in a way that leaves substantial play for tribal self-government, under a voluntary system of partial jurisdiction that reflects a responsible attempt to accommodate the needs of both Indians and non-Indians within a reservation, has plainly taken action within the terms of the offer made by Congress to the States in 1953. For Congress surely did not deny an option State the power to condition its offer of full jurisdiction on tribal consent.

Id. at 498-99.

jurisdiction over one limited area: highways, a subject-matter area that "arguably takes jurisdiction over perhaps the only part of law enforcement which comes close to being self-financing - i.e., enforcement of traffic laws." Rosebud Sioux Tribe, 709 F. Supp. at 1508.[9] The remainder of the 1961 amendment was an attempt to condition full jurisdiction over Indian lands on federal reimbursement.[10]

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[9]The Tribes question the extent of the state's presence on the highways. Current litigation in South Dakota courts challenges the authority of the state, under the 1961 legislation, to enforce compulsory insurance laws against Indians traveling on reservation highways, and the state's authority to proceed beyond the geographic boundary of its jurisdiction, highways, to arrest a tribal member for a traffic offense.

[10]In commenting on the negative impact of the 1961 legislation, a legislative research staff report pointed out that the 1961 law "allowed assumption of total jurisdiction if the federal government

(Footnote Continued)

The major concerns reflected in the passage of PL 280 were (1) to reduce the economic burden of federal jurisdiction over reservations, (2) to respond to a perceived hiatus in law enforcement on reservations, and (3) to assimilate Indians into the general population. Yakima, 439 U.S. at 498.

We believe South Dakota's limited excursion into the area of Indian jurisdiction is not responsive to the concerns underlying the passage of PL 280. Jurisdiction over highways does not go very far in reducing lawlessness on reservations, but simply introduces a third party to the already complex jurisdiction pattern on

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(Footnote Continued)
assumed all costs involved. However, the federal government has not done this, and there appears to be almost no chance that it will." Staff Report, Jurisdiction Over Indian Country in South Dakota, at 7 (S.D. Legis. Research Council, Mar. 5, 1964).

reservations.[11] It also does little to

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[11]There was no shown hiatus in law enforcement on highways within the reservation, but such a hiatus clearly existed in other areas of the law. See Staff Report, supra at 7: "The Interim Investigating Committee subsequently concluded that lack of jurisdiction in the matters of juvenile affairs, domestic relations and institutional commitments in Indian Country seriously hindered the efficient operation of public welfare programs." As the report further points out, there already existed sharing agreements affording some state control over the highways.

> As a practical matter, despite the Hankins ruling, South Dakota does maintain some control of law and order on the public highways running through Indian reservations, through agreements on procedures among the respective tribal councils, the U.S. Bureau of Indian Affairs, and the office of the State Attorney General representing the Highway Patrol. Under these agreements, in order to eliminate legal questions of jurisdiction, highway patrolmen and tribal agents are "cross-commissioned" so their power of arrest cannot be challenged in court. The patrolmen police the highways as they do elsewhere in the state. Indians arrested by them

(Footnote Continued)

reduce federal presence on reservations since the federal government retains the financial burden of the majority of jurisdictional concerns. The Washington statute, which left open the possibility of complete jurisdiction upon tribal consent, reflected an acceptance of the burden of jurisdiction, as well as an attempt to accommodate tribal self-governance. The state's partial jurisdiction assumption here represents the contrary result.[12] We believe that the failure to assume jurisdiction in a manner consistent with the purposes of PL 280 is not

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(Footnote Continued)
are turned over to tribal courts; non-Indians will be tried in state courts.

Id.

[12]South Dakota urges here on appeal, contrary to the district court's findings, that the Tribes should not even share in concurrent jurisdiction.

sufficient "action within the terms of the offer made by Congress to the States in 1953." Yakima, 439 U.S. at 499. See also Bryan v. Itasca County, 426 U.S. 373, 383-85 (1976) (state not allowed to tax Indians on reservations since PL 280's grant of civil jurisdiction was not intended to allow states to impose regulatory laws on Indians); Kennerly v. District Court of Montana, 400 U.S. 423, 427 (1971) (requirements of PL 280 must be strictly followed).

There exists a second and even more compelling reason for rejecting the state's partial assumption of jurisdiction as complying with PL 280. We find that the intent of Congress in 1968 in amending PL 280 to eliminate nonconsensual assumptions of jurisdiction prevents the state from attempting to assume jurisdiction through retroactive application of a new statutory interpretation.

We find support for this conclusion in the purposes that fueled the tribal consent amendment to PL 280. Congress signaled the adoption of a new policy regarding the relationship between Indians and federal and state governments that is reflected in the 1968 amendment, and which we believe cannot be defeated by the retroactive application of a change in statutory interpretation. PL 280 had been the subject of criticism for its failure to include a provision allowing affected Tribes a voice in determining which system of government would regulate them. See F. Cohen, Handbook of Federal Indian Law 177 (1983) (President Eisenhower signed PL 280, but requested Congress immediately amend the statute to include a tribal consent provision). Members of several different tribes consistently and continuously voiced their objection to the lack of a tribal consent provision in PL 280. See Hearings on

H.R. 15419 And Related Bills Before the Subcommittee on Indian Affairs of the House Committee on Interior & Insular Affairs, 90th Cong., 2d Sess. 27 (1968).[13] The 1968 tribal consent amendment was a reflection of the principle that leaders must obtain the consent of those to be governed before assuming power. See Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 89th Cong., 1st Sess. 4 (1965) (statement of Sen. McGovern). This amendment also reflected the shift in national policy toward Indians, from an

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[13]The Indians' objection to nonconsensual assumptions of jurisdiction was based on a belief in tribal sovereignty; a fear of discriminatory operation of state jurisdiction; and disagreement with the ouster of functioning systems of tribal government. See Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 UCLA L.Rev. 535, 544-45 (1975).

assimilationist approach, to a policy promoting tribal self-governance and self-reliance. Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 UCLA L.Rev. 535, 550 (1975).

Significantly, several representatives of South Dakota appeared before the congressional committee considering the amendment, and pronounced their support for a tribal consent provision. These representatives also described South Dakota as a non-PL 280 state, and declared that South Dakota accepted the principle that tribal consent was an important feature of a democratic system of government. See Hearings Before the Subcommittee of Constitutional Rights, supra (statement of South Dakota Assistant Attorney General Andre); Hearings on H.R. Res. 1100 Before the Committee on Rules of the House of

Representatives, 90th Cong., 2d Sess. 2741 (1968) (statement of South Dakota Congressman Reifel). We cannot rely solely upon the statements of these representatives to find a congressional intent that South Dakota be bound by this amendment. We do believe, however, that the entire history of this amendment, including the representations made by these speakers, provides ample support for the conclusion that Congress intended to eliminate completely the ability of a state to assume jurisdiction, without tribal consent, at any time and in any manner after 1968.

We find further support for this conclusion in the repeal of the original section 7 of PL 280, which had allowed assumptions of jurisdiction without consent. It is clear that Congress intended to eliminate the possibility of future nonconsensual assumptions of jurisdiction by

repealing the section under which such jurisdiction was obtained. This repeal did not affect those assumptions of jurisdiction that were already operative. See Act of Apr. 11, 1968, Pub. L. 90-284, Title IV, § 403(b), 82 Stat. 73, 79 (codified at 25 U.S.C. § 1323(b)). But the clear import of the repeal of section 7 was to signal Congress' disapproval of any further nonconsensual assumptions of jurisdiction, through any means.

We acknowledge the existence of the rule of law requiring a change in statutory interpretation to be applied retroactively. See United States v. Estate of Donnelly, 397 U.S. 286, 294-95 (1970); McDonald v. Watt, 653 F.2d 1035, 1042 (5th Cir. Unit A Aug. 1981); Ettinger v. Central Penn Nat'l Bank, 634 F.2d 120, 124 (3d Cir. 1980); Safarik v. Udall, 304 F.2d 944, 949-50 (D.C. Cir.), cert. denied sub nom., 371 U.S. 901 (1962);

Jackson v. Harris, 43 F.2d 513, 516 (10th Cir. 1930). This rule explains that "[t]he effect of the subsequent decisions is not to make a new law but only to hold that the law always meant what the court now says it means." Fleming v. Fleming, 264 U.S. 29, 31-32 (1924). This rule must be evaluated, however, in light of the unique factual circumstances of this case, particularly the background leading up to the intervening congressional amendment.[14]

Although in a different context[15] the observation of the Supreme Court in Chicot

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[14]Professor Calabresi has observed that the review of old statutes requires consideration of post-enactment changes to determine "how the statute fits in the current legal fabric and * * * what has happened to that fabric since the statute was passed." G. Calabresi, A Common Law for the Age of Statutes 129 (Harv. Univ. Press 1982).

[15]In Chicot County the court was

(Footnote Continued)

County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940), concerning the retroactive application of a decision holding a statute unconstitutional is relevant here. The court stated:

> The actual existence of a statute, prior to [a determination of unconstitutionality] is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in

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(Footnote Continued)
concerned with the collateral attack of an earlier judgment, and principles of res judicata. The Bank brought suit to recover against bonds on which the drainage district had defaulted. The district pled as res judicata an earlier judgment approving a plan of readjustment, which barred debts, such as the Bank's, that had not been presented in the debt readjustment proceedings. The Bank attacked the validity of that judgment since a different court had ruled unconstitutional the statute under which the earlier court had acted. 308 U.S. at 372-74. The court ruled that, notwithstanding the subsequent determination of unconstitutionality, the validity of the earlier judgment was not open to collateral attack. Id. at 376-77.

> various aspects,-with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.

Id. at 374 (emphasis added).

The Chicot County court enunciated principles of non-retroactivity which we believe are applicable here. A decision overruling a previous construction of a statute is not given retroactive application where to do so disturbs the vested rights of the parties. See Massaglia v. Commissioner, 286 F.2d 258, 259 (10th Cir. 1961); see also Northern Pipeline Constr. Co. v. Marathon

Pipe Line Co., 458 U.S. 50, 87-88 (1982) (denying retroactive effect to decision where retroactive application would "visit substantial unjustice and hardship" upon litigants who relied on overruled provisions of Bankruptcy Act); Chevron Oil Co. v. Huson, 404 U.S. 97, 107 (1971) (retroactive application should be denied where substantially unequitable result occurs). We believe the Tribes had a vested right in the protection offered by the 1968 tribal consent amendment. A party does not, of course, have a vested right in a judicial decision, Estate of Donnelly, 397 U.S. at 295;[16] however, the

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[16]The Supreme Court pointed out in Estate of Donnelly that the government is entitled to follow what it believes is the correct interpretation of a statute, "and to reap the benefits of that adherence if it proves to be correct[.]" Id. at 294. The Court retroactively applied a change of law in Estate of Donnelly in part because of the (Footnote Continued)

Tribes' vested right here extends not from the ruling in Hankins but from the change in Congress' offer of jurisdiction to the states.

The Supreme Court has considered subsequent "jurisdictional history" in resolving claims of jurisdiction over Indians. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 603-05 (1977); DeCoteau v. District County Court, 420 U.S. 425, 442-43 (1975). In Rosebud Sioux Tribe, which involved the disestablishment of reservation land, the Court supported its conclusion that earlier congressional acts disestablished the

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(Footnote Continued)
government's adherence to the position the Supreme Court eventually adopted. Id. at 295. Here, however, the state not only did not adhere to its claim of jurisdiction, it acquiesced in the Hankins ruling as demonstrated by the position it took during the congressional hearings on the tribal consent amendment.

reservation by reviewing the longstanding pattern of jurisdiction over the land.

> Since state jurisdiction over the area within a reservation's boundaries is quite limited, the fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as part of the "jurisdictional history." The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian * * * not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges.

430 U.S. at 603-05 (citations, footnotes omitted) (emphasis added). We believe retroactive application in this case would disrupt the Tribes' "justifiable expectations."

The Tribes, particularly in South Dakota, have relied on the protection offered by the tribal consent amendment since 1968.

The Tribes have co-existed with state authorities with the knowledge that the state could not assume jurisdiction over them without their consent. The state allowed federal and tribal authorities to exercise jurisdiction prior to and after 1968 without asserting its claim to jurisdiction. Retroactive application of the Yakima interpretation of PL 280 to revive South Dakota's 1961 legislation would disregard the manner in which the Tribes and the state have structured their jurisdictional relationship.

The Supreme has consistently instructed that ambiguities in legislation affecting retained tribal sovereignty must be construed in favor of the Indians. Yakima, 439 U.S. at 484; see also Bryan v. Itasca County, 426 U.S. at 386 (construing effect of legislation affecting Indians in light of "intervening legislative enactments"). This rule of construction becomes crucial when the effect

of a retroactive statutory interpretation is considered.

There is no question that in the enactment of the tribal consent requirement the Tribes were provided a vested interest in self-government and were afforded congressional assurance that jurisdiction not previously assumed by the state could not be taken from them without their consent. At the time this amendment was passed the legislative history demonstrates that both the state and the Tribes announced that no jurisdiction had been assumed by the state prior to the 1968 amendment. We cannot ignore the dramatic shift in national policy toward Indians that is reflected by the tribal consent amendment. To allow the state's claim of jurisdiction would defeat the purpose of the 1968 amendment, and disregard the manner in which the parties have structured their relationship. South

Dakota cannot take advantage of a change in statutory construction without also recognizing the intervening legislation imposing new prerequisites on assumptions of jurisdiction. Since South Dakota has not obtained the consent of the Tribes since 1968, its claim of jurisdiction, made only since the advent of Washington v. Yakima Indian Nation in 1979, is invalid.

In sum we hold that (1) the 1961 legislation did not validly provide for State jurisdiction over the highways within the terms of PL 280; (2) that the self-governmental interests of the Tribes had become vested at the time of the passage of the 1968 amendment and that it was improper to apply Yakima retroactively to hold that state jurisdiction had been assumed prior to the repeal of section 7 of PL 280 in 1968; and (3) that the congressional intent in passing the 1968 amendment did not

contemplate that a subsequent, retroactive application of a change in statutory interpretation could alter South Dakota's lack of jurisdiction existing at the time of the repeal of section 7.

The judgment of the district court is vacated and judgment in favor of the plaintiffs in accord with this opinion is to be entered; the cross-appeal is ordered dismissed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 89-5227/5228/5252SD

Rosebud Sioux Tribe, et al.,	*	
	*	Order Denying
Appellants,	*	Petition for
	*	Rehearing and
v.	*	Suggestion for
	*	Rehearing en Banc
State of South Dakota et al.,	*	
	*	
Appellees.	*	

Appellees' suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judges Fagg, Bowman, Magill and Beam would have voted to grant the petition for rehearing.

Petition for rehearing by the panel is also denied.

June 8, 1990

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

DONALD J. PORTER
CHIEF JUDGE
413 U.S. COURTHOUSE
PIERRE, SOUTH DAKOTA 575091

March 31, 1989

Terry L. Pechota
FINCH, VIKEN, VIKEN & PECHOTA
304 Main, Box 2934
Rapid City, South Dakota 57709
Attorneys for Plaintiff Rosebud Sioux Tribe

Scott B. McElroy
Bruce R. Greene
GREENE, MEYER & McELROY, P.C.,
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
and
Krista Clark
DAKOTA LEGAL SERVICES
P.O. Box 1037
Mission, South Dakota 57555
Attorneys for Plaintiff-Intervenor
Cheyenne River Sioux Tribe

Marvin Amiotte
Attorney at Law
P.O. Box 1053
Pine Ridge, South Dakota 57770
Attorney for Plaintiff-Intervenor
Oglala Sioux Tribe

Michael T. Swallow
DAKOTA PLAINS LEGAL SERVICES
P.O. Box 727
Mission, South Dakota 57555
Attorney for Plaintiff-Intervenor
Standing Rock Sioux Tribe

John P. Guhin
Harold H. Deering, Jr.
Assistant Attorneys General
Office of Attorney General
Natural Resource Section
State Capitol
Pierre, South Dakota 57501
Attorneys for Defendants

RE: CIVIL NO. 86-3019
ROSEBUD SIOUX TRIBE, Plaintiff;
CHEYENNE RIVER SIOUX TRIBE,
Plaintiff/Intervenor; OGLALA
SIOUX TRIBE, Plaintiff/Intervenor;
STANDING ROCK SIOUX TRIBE,
Plaintiff/Intervenor
vs.
STATE OF SOUTH DAKOTA,
GEORGE S. MICKELSON, Governor;
ROGER TELLINGHUISEN, Attorney
General; JIM JONES, Superintendent
of the Highway Patrol, In Their
Official Capacities, Defendants.

Dear Counsel:

MEMORANDUM OPINION

On May 14, 1986, the Rosebud Sioux Tribe filed this action against defendants, the State of South Dakota and various state

officials (hereinafter "the State" or "South Dakota") to seek declaratory and injunctive relief restraining South Dakota from exercising jurisdiction over Indians on highways within the Rosebud Indian Reservation. The Rosebud Sioux Tribe invokes the jurisdiction of this Court under 28 U.S.C. §§ 1331, 1343(3) and (4), 1337, 1362 and 42 U.S.C. § 1983. This Court has permitted the Cheyenne River Sioux Tribe, Oglala Sioux Tribe, and Standing Rock Sioux Tribe to join as plaintiff-intervenors under Rule 24 of the Federal Rules of Civil Procedure. Based on an agreement filed by the parties to this case, this Court on November 19, 1987 ordered that the parties submit the case for decision on the merits by filing cross-motions for summary judgment. Having reviewed the lengthy original and supplemental briefing of the cross-motions for summary judgment and having carefully

considered the issues, this Court denies the summary judgment motion filed by the tribal plaintiffs and grants summary judgment in favor of the State.

I. FACTS

The essential facts in this case are not in dispute. The plaintiffs are federally recognized Indian tribes who sue as sovereign governmental entities and as parens patriae on behalf of tribal members. Each of the tribal plaintiffs presently patrols and enforces traffic laws on roads within their respective reservations. Each tribe has tribal courts, law enforcement officers and detention facilities. The tribes assert that with regard to offenses committed by Indians on roads within the reservations, the United States has exclusive jurisdiction over major crimes and the tribes have exclusive jurisdiction over other crimes.

Defendant South Dakota and its officials assert the authority to enforce state laws on all individuals on highways within the reservations. On several occasions, the State has arrested Indians on roads within Indian country for violating state laws.[17] The tribes have brought this suit to contest state jurisdiction over Indians on roads

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[17]This Court is aware of three such cases: State v. Medearis, No. 85-26, slip op. (6th Judicial Cir. S.D., Jan. 21, 1986); State v. Onihan, Crim.No. 86-168, slip op. (5th Judicial Cir. S.D., May 27, 1987), aff'd, 427 N.W.2d 365 (S.D. 1988); and State v. Cloud, slip op. (5th Judicial Cir. S.D., March 24, 1987). An opinion issued in State v. Goodnick, No. 85-19, slip op. (6th Judicial Cir. S.D., January 15, 1986), though the case involved a non-Indian defendant, held that South Dakota has jurisdiction over offenses committed by non-Indians and Indians alike on highways within Indian reservations. Onihan and Cloud involved prosecutions for drunk driving, while Goodnick involved both drunk driving and vehicular manslaughter charges. In Medearis, the defendant was charged with violating a state statute limiting the weight of certain vehicles driven on highways.

within Indian reservations. To resolve the case, this Court must examine the unique and complex history of jurisdiction over Indians in South Dakota.

II. HISTORICAL DEVELOPMENT OF SOUTH DAKOTA JURISDICTION OVER INDIANS

A. The Organic Law Disclaimer

The Enabling Act passed by Congress to permit South Dakota, North Dakota, Montana, and Washington to enter the Union required each state to disclaim jurisdiction in Indian country. Section 4 of the Enabling Act provided:

> [T]he people inhabiting said proposed States **do agree and declare** that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control

> of the Congress of the United States.

Act of February 22, 1889, ch. 180, § 4, 25 Stat. 676.[18]

In accordance with the Enabling Act, South Dakota incorporated the jurisdictional disclaimer as a compact with the United States in Article XXII of the state constitution. Article XXII, which remains as a part of the current South Dakota Constitution, states:

> [W]e, the people inhabiting the state of South Dakota, **do agree and declare** that we forever disclaim all right and title to the unappropriated public lands lying within the boundary of South Dakota, and to all lands lying within said limits owned or held by

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[18]Congress also required disclaimers of state jurisdiction over Indians in the enabling acts of Utah, Oklahoma, Arizona and New Mexico. See Act of July 16, 1894, ch. 138, 28 Stat. 107 (Utah); Act of June 16, 1906, ch. 32335, 34 Stat. 267 (Oklahoma); Act of June 20, 1910, ch. 310, 36 Stat. 557 (Arizona and New Mexico).

> any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States; and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

Under the 1889 Enabling Act, Article XXII of the South Dakota Constitution, and federal case law, South Dakota traditionally has exercised criminal or civil jurisdiction in Indian country only when Indians were involved. See generally St. Cloud v. United States, 702 F. Supp. 1456, 1459-60 (D.S.D. 1988) (South Dakota would have criminal jurisdiction over rape on reservation only if both victim and assailant were non-Indians); White v. Califano, 437 F. Supp. 543 (D.S.D. 1977), aff'd, 581 F.2d 697 (8th Cir. 1978) (federal rather than South Dakota court has jurisdiction in civil case for commitment of mentally ill Indian on reservation); see

generally Williams v. Lee, 358 U.S. 217, 218-22 (1959).

B. Public Law 280

In 1953, Congress saw fit to alter its compact with disclaimer states by passing legislation known as Public Law 280. Act of Aug. 15, 1953, 67 Stat. 588-590 (codified in part at 18 U.S.C. § 1162 and 28 U.S.C. § 1360). Public Law 280 was passed during an era when Congress sought to diminish the federal trust responsibility to Indian tribes by terminating federal recognition of certain Indian tribes and encouraging assimilation of Indians into white society. Congress by passing Public Law 280 expressly ceded criminal and civil jurisdiction over Indian country to California, Minnesota, Nebraska,

Oregon, and Wisconsin.[19] Public Law 280 gave all other states the option to assume civil and criminal jurisdiction in Indian country, even if the state had an organic law disclaimer of jurisdiction in Indian country as does South Dakota. The two sections of Public Law 280 that apply to South Dakota are sections six and seven,[20] which as originally enacted, stated:

> § 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or

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[19]Public Law 280 exempted a few tribes in these five states from complete state jurisdiction. Congress later added Alaska as a state with "mandatory" Public Law 280 jurisdiction over Native Americans. See 18 U.S.C. § 1162(a) and 28 U.S.C. § 1360(a).

[20]The Supreme Court in Washington v. Yakima Indian Nation, 439 U.S. 436 (1979) ruled that both sections six and seven apply to states with organic law disclaimers like South Dakota. Id. at 496-97.

existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

§ 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislation, obligate and bind the State to assumption thereof.

C. South Dakota Legislation

In 1957, the South Dakota legislature enacted Chapter 319 of the Session Laws of 1957 to assume jursidiction [sic] over Indian country within South Dakota. The Act in section one purported to accept complete criminal and civil jurisdiction over Indian

country within the State, but sections four and five of the Act conditioned the assumption of jurisdiction on tribal consent and approval by the Board of County Commissioners of any county containing Indian country.[21] These conditions were not met, so

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[21]The relevant provisions of Chapter 319 of the 1957 Session Laws stated:

> Section 1. In accordance with the provisions of 67 statutes at large, page 589, Public Law 280, and as Indian Country is defined by Title 18 USCA, Section 1151, the provisions of Chapter 106 of the Session Laws of the State of South Dakota for 1901, as amended, or any law to the contrary, notwithstanding, the state of South Dakota assumes and accepts jurisdiction of all criminal and civil causes of action arising in Indian Country under the provisions of this Act as hereinafter set forth.
>
> Section 4. Jurisdiction shall not be deemed assumed or accepted by this state in any county of South Dakota unless and until a resolution assuming and accepting the same is adopted by the Board of County Commissioners of any

(Footnote Continued)

this enactment never became operative. See In Re Petition of High Pine, 78 S.D. 121, 129, 99 N.W.2d 38, 41 (1959).

In 1959, the South Dakota legislature passed a statute assuming jurisdiction over highways within Indian country built jointly by the state and federal governments.[22] This

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(Footnote Continued)
county containing Indian Country.

> Section 5. Be it further provided that no assumption of civil or criminal jurisdiction shall become effective under the provisions of this Act until the Tribal council of a Tribe over which state jurisdiction is to be taken, shall have considered a referendum in which all persons eligible to vote at elections held for the purposes of electing officers of such Tribe, shall have been given an opportunity to approve or disapprove such assumption of jurisdiction.

[22]This statute stated:

> The United States of America having ceded to the state of South Dakota concurrent police jurisdiction excepting the ten major crimes as defined by 18

(Footnote Continued)

section, codified at SDCL § 1-1-17, was short-lived, as legislation passed in 1961 repealed the 1959 legislation.

The state enactment most critical to a decision in this case came in 1961 when the South Dakota legislature passed chapter 464 of the Session Laws of 1961 [hereinafter

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(Footnote Continued)

> USC section 1153, unless automobile accidents are involved, over all public highways or portions thereof, including rights-of-way, located within the state of South Dakota:
>
> > (1) Which are established through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian, under any laws or treaties, but which have not been conveyed to the allottee with full power of alienation, and;
> > (2) Which were established or which are maintained by the joint participation of the United States and the state of South Dakota.
>
> The state of South Dakota hereby accepts such jurisdiction.

SDCL § 1-1-17.

"1961 Act" or "1961 legislation"]. The 1961 legislation sought to authorize broad state jurisdiction over Indians, but only if the State could obtain funds from the federal government to defray the costs of law enforcement on reservations. During this era, South Dakota was reluctant to accept unqualified jurisdiction in Indian country primarily due to financial concerns.

The two most pertinent sections of the 1961 legislation provided:

> Section 1. [codified at SDCL § 1-1-18] The State of South Dakota, in accordance with the provisions of 67 Statutes at large, page 589 (Public Law 280), hereby assumes and accepts jurisdiction of all criminal offenses and civil causes of action arising in the Indian Country located within this State as Indian Country is defined by Title 18 United States Code Annotated, section 1151, and obligates and binds this State to the assumption thereof.
>
> Section 4. [codified at SDCL § 1-1-21] Except as to criminal offenses and civil causes of action arising on any highways, as the

> term is defined in chapter 31-1,[23] the jurisdiction provided for in Section 1 herein shall not be deemed assumed or accepted by this State, . . . unless and until the Governor of the State of South Dakota, if satisfied that the United States of America has made proper provisions for the reimbursement to this State and its counties for the added costs in connection with the assumption of said jurisdiction, has issued his proper proclamation duly filed with the Secretary of State declaring the said jurisdiction to be assumed and accepted.

The governor, however, never filed the proclamation required by section four, so the generalized assumption of jurisdiction did not take place. Nevertheless, it is on section four of this Act that South Dakota

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[23] SDCL § 31-1-1 states in part: Every way or place of whatever nature open to the public, as a matter of right, for purposes of vehicular travel, is a highway. The term "highway" shall not be deemed to include a roadway or driveway upon grounds owned by private persons, colleges, universities, or other institutions . . . .

bases its assertion of jurisdiction over Indians on highways within Indian country. The State reads section one together with the exception clause of section four, now codified at SDCL § 1-1-21, to authorize state jurisdiction over Indians on reservation highways regardless of whether the governor satisfied the condition in section four of obtaining adequate funding from the federal government.

In 1963, the South Dakota legislature passed yet another statute, this time seeking to accept unconditionally jurisdiction in Indian country. This legislation also purported to repeal the 1961 Act. The 1963 legislation, however, was appropriately referred to a vote of the people of South Dakota. In the 1964 general election, South Dakota rejected the 1963 Act by a vote of 201,389 to 58,289 after Indian tribes lead [sic] a concerted publicity campaign against

the 1963 law. See White v. Califano, 437 F. Supp. 543, 563 (D.S.D. 1977), aff'd, 581 F.2d 697 (8th Cir. 1978); R. Clow, State Jurisdiction on Sioux Reservations: Indian and Non-Indian Responses, 1952-1964, 11 S.D.L. Rev. 171, 176-183 (1966). Under South Dakota law, the 1963 legislation never became effective since it was duly referred to a vote of the people and soundly defeated.

D. In Re Petition of Hankins

The argument of the State that the exception clause of section 4 of the 1961 Act authorizes state jurisdiction on reservation highways was initially made before the Supreme Court of South Dakota to support the 1962 state court conviction of an Indian for drunken driving on an Indian reservation. In In Re Petition of Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964), the South Dakota Supreme Court confronted essentially the same question that this case presents: whether

the 1961 legislation is an effective assumption of state jurisdiction over Indians on roads within Indian country. The court in Hankins concluded that Public Law 280 did not permit South Dakota to assume partial jurisdiction in Indian country over highways alone. The court also stated that partial state jurisdiction under the 1961 Act did not serve the purposes of Public Law 280 and would further complicate questions of who had jurisdiction over Indians. Thus, the court held that the 1961 Act was insufficient to take Public Law 280 jurisdiction and that the state lacked jurisdiction over an Indian driving while intoxicated on a highway within a reservation. Id. at 442-43, 125 N.W.2d at 843.

The South Dakota Supreme Court in a number of cases in the next fifteen years reaffirmed the holding in Hankins. For instance, in Smith v. Temple, 82 S.D. 650,

152 N.W.2d 547 (1967), the court held that South Dakota had no jurisdiction over a suit by one Indian against another Indian arising out of an automobile accident on a highway in Indian country. In Smith, the court stated:

> [T]his state has not effectively, affirmatively, and unequivocally acted to assume jurisdiction in the manner specified in [Public Law 280], therefore . . . criminal jurisdiction over Indians for crimes committed within Indian territory in South Dakota is exclusively vested in the Federal and Tribal courts.

Id. at 548. See also State v. Molash, 86 S.D. 558, 199 N.W.2d 591, 593 (1972); State v. Hero, 282 N.W.2d 70, 72 (S.D. 1979) (South Dakota is not a Public Law 280 state). In addition, even the State took the position in litigation during the late 1960s and the 1970s that it had no jurisdiction over actions on Indian lands. See, e.g., State v. White Horse, 89 S.D. 196, 197-98, 231 N.W.2d 847, 848 (1975) (state stipulates to no

jurisdiction over an Indian drunk driver in Indian country).[24]

E. The Indian Civil Rights Act

Meanwhile, the congressional policy toward Indian tribes shifted in the 1960s from a policy promoting assimilation and termination of federal supervision to a renewed interest in encouraging tribal self-governance and self-reliance. Concomitant with this policy change, Congress enacted in 1968 the Indian Civil Rights Act

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[24]Additionally, in hearings before a congressional subcommittee reviewing Indian law, a representative of the office of the Attorney General of South Dakota stated that "South Dakota never assumed jurisdiction in Indian country." Statement of Walter W. Andre, Assistant Attorney General, State of South Dakota before the Subcommittee on Constitutional Rights of the Senate committee on the Judiciary, Constitutional Rights of American Indian Hearings on S.961-68, S.J. Res. 40, U.S. Senate, 89th Cong., 1st Sess. (1965) at 118) [sic].

(ICRA).[25] Part of the ICRA amended Public Law 280 to require tribal consent as expressed by a majority vote of enrolled adult tribal members before a state could assume further criminal or civil jurisdiction over Indians. The ICRA also authorized partial assumptions of state jurisdiction and left undisturbed state jurisdiction assumed from 1953 to 1968 under the original language of Public Law 280.

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[25]The Indian Civil Rights Act, 82 Stat. 78, is codified at 25 U.S.C. §§ 1321-26.

By 1968, both states and tribes had become dissatisfied with provisions of Public Law 280. Tribes resented that states could unilaterally force state jurisdiction on tribes against the will of the Indian people, and the states disliked the way remaining federal protections seemed to deprive them of the ability to finance their newly acquired powers. Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 538 (1975).

F. Washington v. Yakima Indian Nation

An important event in the development of the dispute in this case occurred in 1979 when the United States Supreme Court decided Washington v. Yakima Indian Nation, 439 U.S. 463 (1979). In Yakima Indian, the Court considered whether the State of Washington properly assumed Public Law 280 jurisdiction through a 1963 statute which took jurisdiction over eight subject matter areas and agreed to accept full jurisdiction upon the consent of individual tribes. The tribes in Yakima Indian challenged Washington's partial assumption of jurisdiction by advancing three arguments: 1) Washington had to amend its constitution before assuming Public Law 280 jurisdiction because Washington had an organic law disclaimer of jurisdiction in Indian country; 2) Public Law 280 did not permit the extension of partial state jurisdiction; and 3) the

Washington statute violated the equal protection and due process guarantees of the Fourteenth Amendment. Id. at 466-67. After a careful examination of Public Law 280, the Court rejected each of these contentions. Because the Washington legislature passed the statute at issue in 1963, the Court scrutinized the Washington statute under the original language of Public Law 280 rather than under the modifications to Public Law 280 contained in the 1968 enactment of the ICRA. Id. at 493 n.40. The Court observed that Congress in 1953 intended Public Law 280 to facilitate and not to discourage the transfer of jurisdiction, id. at 490, and determined that both sections six and seven of the original language of Public Law 280 apply to states with organic law disclaimers of jurisdiction in Indian country, like Washington or South Dakota, id. at 496-97. The Court concluded that

Washington's partial assumption of jurisdiction over Indians was not inconsistent with Public Law 280.

Yakima Indian reveals that the South Dakota Supreme Court in In Re Petition of Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964) misinterpreted provisions of Public Law 280 in two important respects. First, the court in Hankins wrongly concluded that Public Law 280 did not permit a partial assumption of jurisdiction in Indian country. Second, the court mistakenly determined that only section six -- rather than both sections six and seven -- of the original version of Public Law 280 applied to South Dakota. These two flaws in Hankins severely erode the reasoning and holding in Hankins that the 1961 legislation was insufficient to empower South Dakota to enforce state law on Indians on highways within Indian country.

The State argues that the analysis in Yakima Indian alone disposes of this case. The State, however, overlooks several troublesome distinctions between this case and Yakima Indian. First, the Washington statute in Yakima Indian provided a procedure whereby tribes could consent to complete state jurisdiction in addition to unilaterally assuming partial jurisdiction over the following eight subject matters: 1) compulsory school attendance; 2) public assistance; 3) domestic relations; 4) mental illness; 5) juvenile delinquency; 6) adoption proceedings; 7) dependent children; and 8) operation of motor vehicles upon public streets, alleys, roads and highways. Washington v. Yakima Indian Nation, 439 U.S. 463, 465 n.1 (1979). In rejecting an argument by the United States on behalf of the tribe that Washington's assumption of partial jurisdiction was inconsistent with

the goals of Public Law 280, the Court reasoned:

> [The Washington law] does not reflect an attempt to reap the benefits and to avoid the burden of the jurisdictional offer made by Congress. To the contrary, the State must assume total jurisdiction whenever a tribal request is made that it do so.

Indeed, with the possible exception of highway jurisdiction which might yield revenue through fines from violations of traffic laws, the eight areas in which Washington assumed jurisdiction hardly reaped benefits for the state while averting burdensome responsibilities. By contrast, the assumption of jurisdiction by South Dakota solely over reservation roads without offering complete jurisdiction upon tribal consent arguably takes jurisdiction over perhaps the only part of law enforcement which comes close to being self-financing -- i.e, [sic] enforcement of traffic laws.

The second distinction between Yakima Indian and the instant case is that the South Dakota statute at issue provides a far more questionable basis for Public Law 280 jurisdiction than did the Washington enactment. The 1961 South Dakota legislation was ruled ineffective in In Re Petition of Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964), and then went some two decades without being enforced. In addition, the 1961 Act indirectly assumes jurisdiction through a clause excepting highway jurisdiction in Indian country from a section making federal government financing a prerequisite to complete assumption of state jurisdiction in Indian country. The Washington statute at issue in Yakima Indian not only lacked the checkered history of the 1961 Act, but also was substantially more straightforward. Consequently, Yakima Indian alone does not resolve this case, as the state contends.

G. State v. Onihan

Since Yakima Indian severely undermined the reasoning in Hankins, South Dakota after Yakima Indian reevaluated whether the 1961 legislation was an effective grant of state highway jurisdiction in Indian country. The 1961 Act, though never repealed, was omitted from the 1974 revision of the South Dakota Codified Laws because of the holding in Hankins. In the 1985 codification, however, the 1961 Act resurfaced as SDCL §§ 1-1-18 through 1-1-21. South Dakota also ended its hiatus in enforcement of state law on Indians on reservation highways. Beginning in January of 1986, several South Dakota trial courts read Yakima Indian to overrule Hankins and convicted Indians of violating South Dakota law while on highways in Indian

country based on the 1961 legislation.[26] An appeal from one of these trial court rulings reached the South Dakota Supreme Court last year in the case of State v. Onihan, 427 N.W.2d 365 (S.D. 1988).

In Onihan, a state highway patrol officer arrested Dennis Onihan, an enrolled member of the Sisseton Wahpeton Sioux Tribe, for "driving under the influence" while on a highway within Indian trust land. In denying Onihan's motion to dismiss, the trial court ruled that South Dakota had jurisdiction over crimes committed by Indians on any highway within the State pursuant to section four of the 1961 Act, codified at SDCL § 1-1-21. Id. at 366. After reviewing both the history of Public Law 280 and the various attempts by South Dakota to take jurisdiction thereunder,

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[26] See cases cited in supra footnote 1.

the Supreme Court of South Dakota analyzed the legal issues in roughly three-quarters of a printed page. Id. at 370. The court abruptly concluded that the exception clause in SDCL § 1-1-21 was sufficient to transfer civil and criminal jurisdiction over Indians for activities on all highways within the state. Id. The court thus affirmed the trial court decision that the state had jurisdiction over an Indian on a highway in Indian country.[27] The court's treatment of Hankins and ultimate holding strongly suggest that Hankins is in effect overruled.[28]

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[27]The court also held that SDCL § 1-1-21 when read together with SDCL § 1-1-18 satisfied the requirement of "affirmative legislative action," as set out in Kennerly v. District Court of Ninth Judicial Dist. of Montana, 400 U.S. 423 (1971).

[28]The court stated:

It seems clear that to the extent that

(Footnote Continued)

III. ANALYSIS

Based on this array of legislation and cases, this Court must determine two interrelated questions: 1) whether the 1961 Act fulfills the requirements of Public Law 280; and 2) whether the 1968 Indian Civil Rights Act amendment of Public Law 280 or the hiatus of some twenty years in enforcement of the 1961 enactment prevents South Dakota from assuming jurisdiction. This Court will consider each of these questions in turn.

A. The 1961 Act and Public Law 280

1. Extent of Deference to Onihan and Validity of the 1961 Act.

As a general rule, federal courts are bound by the interpretation of state law by

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(Footnote Continued)
Hankins held that state assumption of partial jurisdiction was invalid under Public Law 280, it is now overruled by Yakima.

Id. at 369.

the state's highest court. Wainwright v. Goode, 464 U.S. 78, 84 (1983). Federal courts, however, need not abide by state court interpretations of federal law. The Supreme Court has also suggested that with respect to state court decisions involving Public Law 280, a federal court may review state court interpretations of state law influenced by an accompanying interpretation of Public Law 280. Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 151-52 (1984).

In light of Onihan, this Court is unwilling to declare the 1961 legislation to be an invalid legislative act. Despite the withdrawal of the 1961 legislation from the South Dakota Codified Laws between 1974 and 1985, the South Dakota legislature never effectively repealed the 1961 enactment. Although legislation passed in 1963 would

have repealed the 1961 Act, the 1963 legislation never became effective because of the successful referendum in the 1964 election. Though the South Dakota case of In Re Petition of Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964) seemed to invalidate the 1961 Act, subsequent cases essentially have overruled Hankins and resurrected the 1961 Act. This Court deems it best to defer to the implicit holding of the South Dakota Supreme Court in State v. Onihan, 427 N.W.2d 365 (S.D. 1988) that the 1961 legislation remains an effective state statute notwithstanding its checkered history.

2. Sufficiency of the 1961 Act under Public Law 280.

The question of whether the 1961 legislation is sufficient to assume Public Law 280 jurisdiction presents an issue squarely within this Court's authority to interpret and apply federal law. Washington

v. Yakima Indian Nation, 439 U.S. 463 (1979) disposes of several potential issues in this case by establishing that states with constitutional disclaimers need not amend their constitutions to take jurisdiction under Public Law 280, id. at 484-93, and that assumption of partial jurisdiction over Indians does not contravene the version of Public Law 280 in effect from 1953 to 1968, id. at 493-500. Since the South Dakota statute at issue in this case predates the 1968 Indian Civil Rights Act, this state enactment must meet the requirements of the original version of Public Law 280 in effect from 1953 until 1968. Id. at 493 n.40; Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering P.C., 467 U.S. 138, 150-51 (1984).

To acquire jurisdiction under the original version of Public Law 280, a state must fulfill apparently only two

requirements: 1) affirmative legislative action; and 2) consistency with the purposes of Public Law 280. The Supreme Court in Kennerly v. District Court of Ninth Judicial District of Montana, 400 U.S. 423 (1971) specifically stated the requirement that a state take "affirmative legislative action" to acquire Public Law 280 jurisdiction. Kennerly derived the requirement of affirmative legislative action from the scant legislative history and the wording of section seven of the 1953 version of Public Law 280. Id. at 427. The Court in Kennerly held that unilateral action by the Blackfeet Indian Tribal Council in enacting a law providing for concurrent state and tribal court jurisdiction over cases involving Indian defendants was insufficient to vest state courts with jurisdiction under either the original or amended versions of Public Law 280. In Onihan v. State [sic], 427

N.W.2d 365 (S.D. 1988), the South Dakota Supreme Court -- though not mentioning Kennerly specifically -- concluded that the exception clause in SDCL § 1-1-21 when read together with SDCL § 1-1-18 qualified as "affirmative legislative action." This Court perceives no reason to disturb this portion of Onihan since the Kennerly standard of affirmative legislative action appears to require little more than a bill duly enacted via the state legislative process.

The second requirement of consistency with the purpose of Public Law 280 is implicit from a number of federal decisions. See, e.g., Washington v. Yakima Indian Nation, 439 U.S. 463, 498-99 (1979) (analyzing whether Washington statute was consonant with the legislative intent of Public Law 280). Although apparently no court has explicitly stated consistency with the goals of Public Law 280 as a prerequisite

to a proper assumption of state jurisdiction thereunder, nearly every federal court when faced with a difficult question under Public Law 280 has analyzed the legislative intent of Congress and evaluated the propriety of state jurisdiction in light of the legislative history. See, e.g., California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207-08 (1987); Three Affiliated Tribes of Ft.. Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 143 (1984); Yakima Indian, 439 U.S. at 498-99; Bryan v. Itasca County, 426 U.S. 373, 379-391 (1976); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 662-64 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1979).

The legislative history surrounding the passage of Public Law 280 in 1953 is somewhat equivocal and sparse. Nevertheless, the United States Supreme Court in Bryan v. Itasca County, 426 U.S. 373 (1976) examined

and discerned the congressional intent in enacting Public Law 280. In Bryan, the Supreme Court held that the explicit grant of jurisdiction contained in Public Law 280 to the State of Minnesota did not authorize a Minnesota county to levy personal property taxes on a mobile home located on Indian trust land and owned by an enrolled member of the Minnesota Chippewa Tribe. The Court, after carefully analyzing the legislative history of Public Law 280, determined that the primary concern of Congress in enacting Public Law 280 was to deal with the problem of lawlessness and the absence of adequate tribal law enforcement on certain reservations. Id. at 379. The Court also noted that Public Law 280 "was plainly not meant to effect total assimilation." Id. at

387.[29] In addition, the Court examined the effect of the ICRA on Public Law 280 and construed the initial Public Law 280 grant in light of the ICRA modifications. Id. at 386.

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[29]The Court in Bryan also quoted the opinion of the Court of Appeals for the Ninth Circuit in Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1979) in stating "courts 'are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.'" Bryan, 426 U.S. at 388, n.14. Related maxims of statutory construction in Indian law require this Court to resolve ambiguities in favor of Native Americans and to construe liberally statutes passed on behalf of Native Americans. Antoine v. Washington, 420 U.S. 194, 199-200 (1975); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973). A court, however, may not use these canons of construction to change the meaning of unambiguous statutes or to disregard the express intent of Congress. South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 506 (1986).

The Supreme Court reaffirmed this interpretation of Public Law 280 in Washington v. Yakima Indian Nation, 439 U.S. 463 (1979), but noted that Public Law 280 was designed to facilitate, not to frustrate, the transfer to states of jurisdiction over Indians. Id. at 490.[30] In addition, other authority suggests that besides reducing lawlessness on reservations, Congress also intended Public Law 280 to accomplish two subsidiary goals: 1) lessening the burden on the federal government of the trust relationship with Indian tribes; and 2) gradually placing the responsibility on

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[30]The report of the committee considering Public Law 280 suggests that the law was a part of the congressional attempt to diminish federal responsibility for Indian affairs and eventually terminate federal supervision altogether. See generally HR Rep. no. 848, 83d Cong., 1st Sess. (1953); S. Rep. No. 699, 83d Cong., 1st Sess. (1953).

individual states to provide criminal and civil forums and laws to govern Indian people.[31] The 1961 Act appears to satisfy the goal of beginning a gradual transfer of responsibility over Indians to the State, but is not likely to alleviate much of the burden

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[31] See Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 542 (1975).

The federal government has abandoned the policy of transferring its trust responsibilities to the states and has adopted legislation encouraging tribal self-dependence and sovereignty. Nevertheless, this Court must apply Public Law 280 as it existed in 1953. Washington v. Yakima Indian Nation, 439 U.S. 463, 493 n.40 (1979); cf., Shakopee Mdewakanton Sioux Community v. Prior Lake, 771 F.2d 1153 (8th Cir. 1985), cert. denied, 475 U.S. 1011 (1986) (consent of Indian tribe embodied in 1968 ICRA amendment not required prior to municipalities annexation of reservation land in Minnesota since Minnesota acquired jurisdiction under original enactment of Public Law 280); St. Cloud v. United States, 702 F. Supp. 1456 (D.S.D. 1988) (reluctantly applying termination legislation though termination policy long abandoned).

of the federal trust relationship. However, it is the primary congressional goal of reducing perceived lawlessness on reservations and the motive of South Dakota in seeking partial Public Law 280 jurisdiction that concerns this Court.

The State contends that state jurisdiction over Indians on reservation highways will reduce lawlessness in Indian country and has presented statistics to demonstrate that the rate of fatal highway accidents tends to be three times higher on South Dakota Indian reservations than throughout the rest of South Dakota. Additionally, the State asserts that the political nature of tribal law enforcement frustrates stringent enforcement of drunk driving laws by the tribes. The plaintiff tribes strongly contest these contentions and point to shortcomings and inconsistencies in the statistics presented by the State. The

tribal plaintiffs argue that despite modest budgets for law enforcement, tribal law enforcement is effective.

This Court is reluctant to make a hasty judgment on the efficacy of tribal law enforcement on each of the reservations within South Dakota. Even if the position of the tribal plaintiffs is taken as true, however, the addition of another law enforcement authority with jurisdiction over Indians on highways within Indian country would serve to ensure even further compliance with traffic laws. This Court therefore cannot conclude that the extension of state highway jurisdiction under the 1961 Act disserves the legislative intent of Public

Law 280 to reduce perceived lawlessness on reservations.[32]

This Court, nevertheless, is concerned that South Dakota may be asserting jurisdiction over Indians on highways to raise revenue through traffic ticketing rather than to promote the goals of Public Law 280. The plaintiff tribes assert that the state exercise of jurisdiction over Indians on highways within Indian

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[32]Certainly there are a number of policy arguments for limited South Dakota jurisdiction on reservation highways since state jurisdiction over Indians might lead to strained relationships between the State and tribes, the weakening of tribal law enforcement authority, and the surfacing of difficult jurisdictional questions. Congress in passing Public Law 280 in 1953, however, made the policy decision to permit unilateral assumption by states of jurisdiction over Indians notwithstanding the unpleasant consequences. This Court is not empowered to alter such congressional policy decisions. Such arguments against state jurisdiction are better directed to Congress or the South Dakota legislature.

reservations partially robs from the tribes a source of revenue -- fines from traffic tickets.[33] The history and language of the 1961 legislation indicate that the State was concerned about financing state law enforcement in Indian country. Presumably, the chief reason for excepting highway jurisdiction from the conditional language codified in SDCL § 1-1-21 was that highway jurisdiction is somewhat self-financing as a result of monies collected from traffic tickets.

Throughout this litigation, the State has downplayed the ability of traffic ticket

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[33]State jurisdiction over Indians on reservations pursuant to Public Law 280 is concurrent with continued tribal jurisdiction. F. Cohen, Handbook of Federal Indian Law 367 (1982 ed.). Thus, state enforcement of its traffic laws might dilute -- but would not eliminate -- tribal revenue from traffic tickets.

proceeds to offset costs of law enforcement on highways in Indian country. Rather, the State has emphasized that its motive in extending state highway jurisdiction to Indians in Indian country is to reduce accidents and instances of drunk driving. Indeed, all but one of the arrests of Indians based on the 1961 legislation that this Court is aware of involved intoxicated drivers.[34] Given the evidence presented, it appears that the State does not intend to exercise jurisdiction over Indians as a means of revenue raising.[35] Moreover, though

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[34] See cases cited in supra footnote 1; see also In Re Petition of Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964) (drunk driving arrest of Indian under 1961 legislation at issue).

[35] If the State's conduct in enforcing its traffic laws on Indians in Indian country demonstrates that this conclusion is mistaken, this Court might reevaluate its

(Footnote Continued)

financing law enforcement on reservation Indians was a clear concern of the 1961 legislation, there is no evidence that the 1961 Act was enacted as a guise for collecting monies from Indians. Thus, there are insufficient grounds to conclude that the 1961 Act is inconsistent with the policy of Public Law 280.[36]

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judgment. Ideally, the State should negotiate with the tribe a means of dividing traffic ticket monies if the amounts collected by the State exceed the cost of enforcing state traffic laws on reservation Indians.

[36]The South Dakota Supreme Court in In Re Petition of Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964) reached the contrary conclusion. The Court in Hankins reasoned:

> It seems to us that [the 1961] legislation does not tend to accomplish or promote the congressional purposes of Public Law 280. To the contrary, it would proliferate the law enforcement authorities in Indian country by adding the state as another entity with geographically limited jurisdiction
> (Footnote Continued)

B. Effect of 1968 ICRA Amendment of Public Law 280.

(Footnote Continued)

> where the Federal and Tribal courts already operate, each with limited subject matter jurisdiction. Moreover, it makes inescapable the checkerboard jurisdiction condemned in Seymour v. Superintendent, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 [(1962)], wherever the extent of the highway right of way is not clear from markings on the ground. This we think would be commonplace on highways in our sparsely settled Indian reservations.

Id. at 443, 125 N.W.2d at 843.

The court in Hankins believed that Congress in enacting Public Law 280 had two goals: 1) withdrawal of federal responsibility where practicable; and 2) termination of the federal trust relationship. Id. Supreme Court cases subsequent to 1964 demonstrate that the court in Hankins misunderstood the primary intent of Congress. The Hankins court also misread Public Law 280 to disapprove of the partial assumption of state jurisdiction. These misinterpretations of Public Law 280 prompted the Hankins court to conclude that the 1961 legislation departed from the intent of Congress. Consequently, the language in Hankins quoted above is not persuasive.

The plaintiff tribes argue that South Dakota's assertion of jurisdiction over reservation Indians contravenes the 1968 amendments to Public Law 280 enacted through the Indian Civil Rights Act, 82 Stat. 78, codified at 25 U.S.C. § 1321-26. If the ICRA amendments to Public Law 280 apply, assumption of jurisdiction by South Dakota is invalid since the ICRA made consent of Indian people a prerequisite to further assumption of state jurisdiction under Public Law 280. See 25 U.S.C. §§ 1321, 1322, 1326. Indian tribes within South Dakota have never consented to -- and indeed have consistently and adamantly objected to -- state jurisdiction over Indians in Indian country. To support their assertion that the ICRA amendments apply to this case, the tribes appear to make two separate arguments: 1) South Dakota had not assumed jurisdiction in Indian country before the 1968 ICRA

amendments and thus the post-1968 version of Public Law 280 governs; and 2) Congress in enacting the ICRA intended to include South Dakota in the provisions requiring tribal consent for Public Law 280 jurisdiction for states "not having jurisdiction over . . . Indians in . . . Indian country."

The analysis in the previous section of this opinion demonstrates that the assumption of jurisdiction at issue in this case occurred in 1961.[37] The ICRA itself[38] and

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[37]This Court's holding would be entirely different if it found that the assumption of jurisdiction occurred sometime after 1979 when Yakima Indian revealed errors in the legal analysis of In Re Petition of Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964). Indeed, if any event after 1968 is taken as the time of South Dakota's assumption of jurisdiction, both the requirements of tribal consent in the ICRA and of affirmative legislative action expressed in Kennerly v. District Court of Montana, 400 U.S. 423 (1971) would be violated. However, the 1961 legislation -- rather than the rebirth of state

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two Supreme Court cases make clear that the ICRA amendments did not affect assumptions of state jurisdiction predating 1968, and thus state enactments before 1968 must be judged under the original version of Public Law 280. Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 150-51 (1984); Washington v. Yakima Indian Nation, 439 U.S. 463, 493 n.40 (1979). Not until 1968 did Public Law 280 contain a provision requiring tribal consent to state

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enforcement of that enactment following Yakima Indian -- is the assumption of Public Law 280 jurisdiction that must be scrutinized.

[38]Section 403(b) of Title IV of the ICRA, codified at 25 U.S.C. § 1323(b), states:

> Section 7 of [the 1953 enactment of Public Law 280] is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

assumptions of jurisdiction in Indian country. See Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L.Rev. 535, 544-45 (1975) (tribal consent intentionally omitted from 1953 enactment of Public Law 280). The 1961 legislation withstands scrutiny under the applicable federal law and thus must be upheld notwithstanding provisions in the ICRA. Cf., Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) (upholding Washington assumption of Public Law 280 jurisdiction without tribal consent when Washington statute predated ICRA amendment of Public Law 280); see also Shakopee Mdewakanton Sioux Community v. Prior Lake, 771 F.2d 1153 (8th Cir. 1985), cert. denied, 475 U.S. 1011 (1986) (tribal consent not required when Minnesota municipality annexes reservation land since Minnesota obtained

Public Law 280 jurisdiction under the original language enacted in 1953).

The second argument of the tribes for the application of the ICRA amendments to this case is that Congress in 1968 believed that South Dakota had failed to take Public Law 280 jurisdiction altogether and thus intended the ICRA requirement of tribal consent to apply to South Dakota. The crux of this argument is that Congress intended South Dakota to be encompassed as a state "not having jurisdiction over . . . Indians in . . . Indian country" as that language is used in sections requiring tribal consent for extensions of state criminal and civil laws.[39] The South Dakota cases in the 1960s

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[39]Section 401(a) of Title IV of the ICRA, codified at 25 U.S.C. § 1321(a), states:

(Footnote Continued)

(Footnote Continued)

> The consent of the United States is hereby given to any state not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

Section 402(a) of Title IV of the ICRA, 25 U.S.C. § 1322(a) provides:

> The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all

(Footnote Continued)

disavowing state jurisdiction over reservation Indians[40] and a very small portion of the legislative history[41] support this argument. The tribes thus argue that whatever jurisdiction South Dakota now asserts must be judged under the ICRA amendments to Public Law 280.

It is difficult to reconcile the tribes' interpretation of the ICRA with Section

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(Footnote Continued)

> such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

[40] See, e.g., Smith v. Temple, 82 S.D. 650, 152 N.W.2d 547 (1967); In Re Petition of Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964).

[41] See supra footnote 7.

403(b) of Title IV of the ICRA, 25 U.S.C. § 1323(b), which provides that the partial repeal of the original language of Public Law 280 "shall not affect any cession of jurisdiction" made under the initial provision authorizing "option" states like South Dakota to assume jurisdiction in Indian country. The legislative history and language of the ICRA indicate that Congress in referring to states "not having jurisdiction" intended neither to single out any particular state or states nor to adjudge which states had or had not assumed jurisdiction before 1968 under Public Law 280. This Court perceives no ambiguity in the ICRA language as it applies to South Dakota. Sections of the ICRA codified at 25 U.S.C. §§ 1321 and 1322 requiring tribal consent would apply to South Dakota attempts to assume jurisdiction after 1968; however, under the ICRA section codified at 25 U.S.C.

§ 1323(b), the tribal consent requirement in the ICRA would not apply to whatever jurisdiction South Dakota had properly assumed prior to 1968. Consequently, the ICRA amendments do not affect the analysis of what jurisdiction South Dakota assumed under the 1961 legislation.

C. Effect of the Lapse in Enforcement in South Dakota of Public Law 280 Jurisdiction

The tribal plaintiffs also argue that it is improper for South Dakota to assert jurisdiction under the 1961 legislation after failing to enforce state jurisdiction over Indians on reservation highways for some twenty years between 1964 and roughly 1984. The tribes cite United States Supreme Court cases recognizing that longstanding practices may create "justifiable expectations" and a "jurisdictional history" may affect interpretation of unclear legislation pertaining to Indian laws. For example, in

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), the Court in examining whether Congress intended to disestablish part of the Rosebud Sioux Reservation through legislation enacted in 1904, noted that:

> . . . the fact that neither Congress nor the Bureau of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority, is a factor entitled to weight as a part of the "jurisdictional history." The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges. We are simply unable to conclude that the intent of the 1904 Act was other than to disestablish.

Id. at 604-05; see also DeCoteau v. District County Court, 420 U.S. 425, 442 (1975); Solem v. Bartlett, 465 U.S. 463, 471 (1984).

The Supreme Court cases relying on jurisdictional history and justifiable expectations are not pertinent to this case for two reasons. First, the "jurisdictional history" and "justifiable expectations" devices are guides for interpretation of unclear statutes. The twenty year hiatus in enforcement under the 1961 Act hardly aids this Court in understanding the pertinent provisions of Public Law 280 and truly only demonstrates that the State took seriously the decision in In Re Petition of Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964), which ruled the 1961 legislation insufficient to accept Public Law 280 jurisdiction. The difficulty with the 1961 legislation is not that it is unclear, but that is has a somewhat checkered history. The twenty year hiatus in state enforcement of its laws against Indians on reservation highways simply is not a useful interpretive tool since it does not influence

a proper understanding of the 1961 legislation or Public Law 280.

Second, state assumption of jurisdiction over Indians on reservation highways does not truly disrupt "justifiable expectations" resulting from the twenty year respite in state enforcement. The tribes imply that enforcement of state law on reservation highways will undermine tribal law enforcement which has been nurtured in the last two decades. As this Court stated earlier, state highway authority under Public Law 280 would be concurrent with continued tribal authority. The State is not displacing tribal authority, but is complimenting it with regard to criminal and civil jurisdiction. Although the tribes through the late 1960s and the 1970s may have expected that they would remain the sole authority over Indians on Indian country highways, the sharing of such authority with

the State does not constitute such a severe disruption of "justifiable expectations" to merit disregarding compelling legal reasons for acknowledging the enforceability of the 1961 legislation. Though this Court is sympathetic to the position of the plaintiff tribes, the jurisdictional history and justifiable expectations analysis in several Supreme Court cases are insufficient grounds to grant judgment in favor of the tribes.

IV. CONCLUSION

Pursuant to the 1953 version of Public Law 280 and state legislation enacted in 1961, South Dakota validly assumed civil and criminal jurisdiction concurrent with the tribes over Indians on all highways within the state. Although the 1961 legislation has a rather checkered history, this Court respects the decision of the Supreme Court of South Dakota that the law remains in effect. The 1961 legislation complies with applicable

federal law requirements under the original language of Public Law 280. Neither the 1968 amendment of Public Law 280 nor the lapse of some twenty years in state enforcement alters the conclusion that South Dakota effectively assumed jurisdiction under Public Law 280. Therefore, this Court denies the motion for summary judgment of the tribal plaintiffs and grants the summary judgment motion filed by the state defendants.

BY THE COURT:

/s/ DONALD J. PORTER
CHIEF JUDGE

Supreme Court, U.S.
FILED
DEC 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 90-749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF SOUTH DAKOTA, *et al.*,
Petitioners,

v.

ROSEBUD SIOUX TRIBE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SCOTT B. MCELROY
GREENE, MEYER & MCELROY, PC
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
(303) 442-2021
Counsel for
Cheyenne River Sioux Tribe

WILLIAM R. PERRY *
REID PEYTON CHAMBERS
SONOSKY, CHAMBERS & SACHSE
1250 Eye Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 682-0240
Counsel for
Standing Rock Sioux Tribe

TERRY L. PECHOTA
FINCH, VIKEN, VIKEN
& PECHOTA
304 Main—P.O. Box 2934
Rapid City, South Dakota 57709
(605) 348-6547
Counsel for
Rosebud Sioux Tribe

MARVIN AMIOTTE
P.O. Box 1053
Pine Ridge, South Dakota 57770
(605) 867-5140
Counsel for Oglala Sioux Tribe

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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---

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

In this case the Court of Appeals ruled that federal law does not grant South Dakota jurisdiction over tribal members on highways on Indian reservations.[1] The Supreme Court of South Dakota agrees. *State v. Spotted Horse*, No. 16644 (S.D. Oct. 4, 1990). The Eighth Circuit's ruling preserves the longstanding *status quo*, as the Tribes and United States have always exercised ju-

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[1] The Eighth Circuit's ruling involves authority to govern the conduct of tribal members on reservation highways. This case raises no issue regarding tribal jurisdiction over non-Indians on fee lands, *see Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. ——, 106 L.Ed.2d 343 (1989), or of jurisdiction over commercial dealings involving non-Indians, *see California v. Cabazon Band of Indians*, 480 U.S. 202, 224 (1987) (Stevens, J., dissenting).

risdiction over tribal members on highways running through Indian reservations in South Dakota. The case relates only to the unique and inconsistent actions of South Dakota concerning jurisdiction over highways on reservations, and presents no issue requiring this Court's review.

STATEMENT OF THE CASE

In 1953 Congress enacted Public Law 280, a federal offer for states including South Dakota to accept jurisdiction over Indian country.[2] *Washington v. Yakima Indian Nation*, 439 U.S. 463, 472-73, 499 (1979). South Dakota purported to accept this offer in 1961, enacting a statute [3] asserting jurisdiction over highways in Indian country. In 1964 the Supreme Court of South Dakota invalidated the 1961 Act. *In re Hankins*, 80 S.D. 435, 125 N.W.2d 839 (1964). That same year, the voters of South Dakota by referendum overwhelmingly rejected a separate effort by the State to take jurisdiction under Public Law 280.[4]

In 1968 Congress amended Public Law 280, making its offer for states to attain jurisdiction over Indians conditional upon tribal consent.[5] South Dakota, in testimony to Congress on these Amendments, stated it had no Public Law 280 jurisdiction and urged adoption of the tribal consent provision, in lieu of the tribes' proposal for outright repeal of Public Law 280.[6] Congress enacted the

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[2] Act of Aug. 15, 1953, Pub. L. No. 83-280, c.505, 67 Stat. 588-590.

[3] S.D. Session Laws 1961, ch. 464, S.D. Codified Laws Ann. § 1-1-18 to 1-1-21 (1985) (hereafter "1961 Act").

[4] 900 F.2d 1164, 1167 (8th Cir. 1990); *see* S.D. Codified Laws Ann. § 1-1-21, Historical Note (1985).

[5] Indian Civil Rights Act of 1968, Pub. L. No. 90-284, Title IV, 82 Stat. 78-80, 25 U.S.C. § 1321-26 (hereafter "1968 Amendments").

[6] *See* pp. 11-13 *infra*.

consent provision sought by South Dakota, instead of the tribal proposal.

In the mid 1980's, South Dakota began to assert jurisdiction over Indians on reservation highways,[7] without meeting the condition of tribal consent which Congress imposed at South Dakota's urging. The Tribes filed this action to enjoin the State from asserting jurisdiction over Indians without tribal consent.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS AND THE SUPREME COURT OF SOUTH DAKOTA

The State's own Supreme Court held, in a unanimous opinion issued after the Court of Appeals' decision, that "South Dakota does not have jurisdiction over Indian country, nor may the State exercise partial jurisdiction over highways running through the reservations." *State v. Spotted Horse*, No. 16644, slip op. at 8 (S.D. Oct. 4, 1990) (8a-9a).[8] With the Court of Appeals and the Supreme Court of South Dakota in agreement, and with no conflict between these rulings and any other, there is no need for review by this Court.

II. THIS CASE RAISES NO ISSUE OF GENERAL APPLICABILITY

As the Court of Appeals stated, this case turns on the "unique factual circumstances of this case. . . ."[9] Only in South Dakota did the legislature assert jurisdiction

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[7] 900 F.2d at 1168.

[8] The opinion is attached as the appendix to this opposition, pp. 1a-23a. It is the final ruling of the Supreme Court of South Dakota, as the State's motion for leave to file a motion for rehearing was denied as untimely. 24a.

[9] 900 F.2d at 1172.

limited to reservation highways.[10] Only in South Dakota did the State Supreme Court invalidate the State's attempt to take jurisdiction, holding the 1961 Act to be void. *In re Hankins*, 80 S.D. 435, 125 N.W.2d 839 (1964);[11] *see* S.D. Codified Laws Ann. 1-1A-1 (1985). Only in South Dakota did the State fail to exercise *any* jurisdiction over Indians on reservations for over 20 years[12]—and then seek to assert that jurisdiction without tribal consent long after Congress made unconsented assertions of jurisdiction illegal in the 1968 Amendments to Public Law 280. Only in South Dakota did the voters of the State overwhelmingly reject Public Law 280 jurisdiction by referendum.[13] Only South Dakota's congressional delegation told Congress—during consideration of the 1968 Amendments to Public Law 280—of their personal participation in that referendum, proudly citing it as demonstrating the principle that government requires the consent of the governed.[14] Only South Dakota's

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[10] The 1961 Act, *supra* n.3, would have provided full jurisdiction over Indian country, but only if the federal government paid for South Dakota's exercise of such jurisdiction. This condition was never met. 900 F.2d at 1170, n.10.

[11] South Dakota did not seek this Court's review of *Hankins*, instead waiting twenty years before claiming it was wrongly decided.

[12] 709 F. Supp. 1502, 1515 (D.S.D. 1989). The State also concedes it exercised no jurisdiction over Indians prior to 1961.

[13] In 1963, the South Dakota legislature enacted a measure to extend state jurisdiction to all of Indian country in South Dakota. S.D. Session Laws 1963, ch. 467. The 1963 Act became the subject of a petition drive, which succeeded in having the measure placed on the ballot in the November 1964 election. In the resulting referendum, South Dakota voters overwhelmingly defeated the measure by more than a 3 to 1 vote. *See* S.D. Codified Laws Ann. § 1-1-21, Historical Note (1985); 900 F.2d 1164, 1167 (8th Cir. 1990); 709 F. Supp. 1502, 1506 (D.S.D. 1989).

[14] *Hearings on S. 961-S. 968 Before the Subcommittee on Constitutional Rights, Senate Judiciary Committee*, 89th Cong., 1st Sess.

Assistant Attorney General testified to Congress before passage of the 1968 amendments that his state had no Public Law 280 jurisdiction—and would not assume any without tribal consent.[15]

Since no other state has the same jurisdictional history in any of these critical respects, the Court of Appeals' opinion has no applicability beyond South Dakota.[16]

III. THE DECISION BELOW PRESERVES THE LONG-STANDING JURISDICTIONAL STATUS QUO

The Tribes and United States have always exercised jurisdiction over tribal members on highways running through Indian reservations, as elsewhere throughout the Indian reservations in South Dakota. South Dakota alleges that it asserted jurisdiction over Indians on reservation highways for a brief period—1961 to 1964 [17]—but unquestionably did not exercise jurisdiction any time before 1961, or from 1964 until the mid-1980s.[18] As the

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15-16 (1965) (hereafter "1965 Hearings"); *Hearings on H.R. Res. 1100 Before the Committee on Rules of the House of Representatives*, 90th Cong., 2d Sess. 35 (1968) (hereafter "1968 Hearings").

[15] *1965 Hearings, supra* n.14, at 112.

[16] South Dakota suggests (Pet., pp. 14-15) that the Court of Appeals' ruling may affect three other states which took less than full jurisdiction under Public Law 280. But the Court of Appeals makes clear that its opinion deals only with the circumstances of South Dakota's assertion of jurisdiction, which are shared by no other state. We note also that no other state has seen fit to participate at any stage in this case, as *amicus* or otherwise.

[17] South Dakota made no showing and the District Court made no findings as to whether South Dakota actually exercised jurisdiction even in this time frame.

[18] The District Court found that following *In re Hankins*, 80 S.D. 435, 125 N.W.2d 839 (1964), South Dakota did not assert jurisdiction over Indians on reservation highways for over twenty years, citing the first renewed attempts to assert such jurisdiction as taking place in 1986. 709 F. Supp. at 1503, n.1.

State concedes,[19] Congress has continuously appropriated substantial federal revenues for law enforcement on these reservations. This Court has acknowledged that existing jurisdictional patterns are given weight in construing the intent of Congress. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 603-05 (1977).

South Dakota's position here would radically alter the *status quo*.[20] If South Dakota prevailed, the conviction of every Indian who committed any offense occurring on a reservation highway in South Dakota at least since 1964 would be thrown into question—both tribal convictions, and federal convictions for major crimes under 18 U.S.C. § 1153.

IV. THIS COURT HAS ESTABLISHED CLEAR GOVERNING PRINCIPLES FOR CONSTRUING PUBLIC LAW 280

The governing principles for interpreting Public Law 280 have been clearly expressed by this Court in its prior decisions.[21] While Public Law 280 was designed to enable states to obtain certain jurisdiction over Indian reservations, it "was not intended to effect total assimilation of

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[19] Pet., p. 19 n.1.

[20] This Court's decision in *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979), preserved the *status quo* in Washington, where state jurisdiction under Public Law 280 had been continuously exercised and had been upheld in an unbroken line of state court cases. *E.g.*, *Makah Indian Tribe v. State*, 457 P.2d 590 (Wash. 1969), appeal dismissed, 397 U.S. 316 (1970); *Tonasket v. State*, 525 P.2d 744 (Wash. 1974), appeal dismissed, 420 U.S. 915 (1975); *Comenout v. Burdman*, 525 P.2d 217 (Wash. 1974), appeal dismissed, 420 U.S. 915 (1975).

[21] *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979); *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138 (1984); *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1986); *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987).

Indian tribes into mainstream American society." *California v. Cabazon Band of Indians*, 480 U.S. 202, 208 (1987). For that reason, this Court has "enforced the procedural requirements and the jurisdictional provisions of Pub L 280 quite stringently . . ." *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 887 (1986); *see Washington v. Yakima Indian Nation*, 439 U.S. 463, 484 (1979). Public Law 280 must be construed in line with "Congress' jealous regard for Indian self-governance." *Three Affiliated Tribes*, 476 U.S. at 890. Consistent with the overriding federal policy of the last two decades of promoting tribal self-government,[22] courts are not "obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship." *Bryan v. Itasca County*, 426 U.S. 373, 388 n.14, quoting *Santa Rosa Band v. Kings County*, 532 F.2d 655, 663 (9th Cir. 1975). This case presents no reason to revisit these principles.

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[22] This policy was given perhaps its most fundamental expression in President Nixon's Special Message to the Congress on Indian Affairs, 1970 Pub. Papers 564 (Richard M. Nixon); *see Felix Cohen's Handbook of Federal Indian Law*, p. 186 (1982 ed.) The policy espoused by President Nixon—which has remained the cornerstone of federal Indian policy to the present—gave rise to legislation including the Indian Self-Determination Act, Act of January 4, 1975, Pub. L. No. 93-638, 88 Stat. 2203, codified at 25 U.S.C. § 450 *et seq.* (1982) and Indian Financing Act, Act of April 12, 1974, Pub. L. No. 93-262, 88 Stat. 77, codified at 25 U.S.C. § 1451 *et seq.* (1982). *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.17 (1983). *See also California v. Cabazon Band of Indians*, 480 U.S. 202, 216-17 (1987) (President Reagan's 1983 Statement on Indian Policy, reaffirming the self-determination policy for tribes).

V. THE COURT OF APPEALS PROPERLY APPLIED THE PRINCIPLES ARTICULATED BY THIS COURT

A. South Dakota's 1961 Act did not comply with Public Law 280, as construed by this Court in Yakima

This Court's jurisprudence on Public Law 280 was properly applied by the Court of Appeals in this case. The Court of Appeals examined this Court's rulings—particularly *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979)—and concluded that South Dakota's 1961 Act did not meet this Court's standards for securing jurisdiction under Public Law 280.[23]

The Court of Appeals properly rejected South Dakota's argument that the Washington jurisdictional scheme at issue in *Yakima* was in all pertinent respects the same as South Dakota's. 900 F.2d at 1170-71.[24] Finding Washington's statutory scheme different from South Dakota's, the Court of Appeals reviewed the 1961 South Dakota Act in light of the purposes of Public Law 280, as set forth by this Court in *Yakima*. *Id.* This Court articulated the "major concerns underlying the passage of Public Law 280" as follows:

> to reduce the economic burdens associated with federal jurisdiction on reservations, to respond to a perceived hiatus in law enforcement protection available

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[23] South Dakota suggests (Pet., p. 13) that under the Court of Appeals' ruling "*Hankins* would be given effect and *Yakima* would not." On the contrary, both the Court of Appeals in this case and the Supreme Court of South Dakota in *Spotted Horse*, relying on *Yakima*, held that *Hankins* was correctly decided.

[24] Washington's scheme, as this Court found, accepted the burdens as well as the benefits of Public Law 280 jurisdiction, while South Dakota's did not. 900 F.2d at 1170, *quoting Yakima*, 439 U.S. at 499. Washington's scheme left "substantial play for tribal self-government," *Yakima*, 439 U.S. at 499, while South Dakota—which seeks totally to preclude tribal authority over tribal members on reservation highways—did not.

> to tribal Indians, and to achieve an orderly assimilation of Indians into the general population.

Yakima, 439 U.S. at 498.[25] The Court of Appeals simply applied the standards in *Yakima* to the unique facts of South Dakota and properly found the 1961 South Dakota Act inconsistent with Public Law 280.[26]

B. The Court of Appeals properly ruled that the 1968 tribal consent provision bars South Dakota from asserting jurisdiction over reservation highways

The Court of Appeals also rejected South Dakota's claim to jurisdiction because it violates the tribal consent provision of the 1968 Amendments to Public Law 280. 900 F.2d at 1171.[27] This holding is correct, and does not merit review.

The Court of Appeals found that the language of the 1968 Amendments prohibits South Dakota's unconsented assertion of jurisdiction, which commenced after this Court's *Yakima* decision.[28] The 1968 Amendments provide that "any State not having jurisdiction over crim-

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[25] As this Court stated in *Yakima* "[t]hat these were the major concerns underlying the passage of Pub L 280 cannot be doubted." 439 U.S. at 498.

[26] South Dakota's assertions regarding highway fatalities (Pet. pp. 13-14) provide no grounds for review by this Court. South Dakota made no showing whatever that state jurisdiction would reduce fatalities on the reservation highways. For example, no evidence was presented showing that reservation highway fatalities have actually declined in any state that has assumed Public Law 280 jurisdiction. The factors causing highway fatalities were not litigated below, and indeed, were not relevant. The case was submitted in the district court on cross motions for summary judgment.

[27] *Yakima* did not involve any issue concerning application of the 1968 Amendments to Public Law 280. Unlike South Dakota, Washington had continuously exercised Public Law 280 jurisdiction since well before the 1968 Amendments.

[28] 900 F.2d at 1168.

inal offenses committed by or against Indians . . ." could obtain such jurisdiction only with the prescribed tribal consent. 25 U.S.C. § 1321(a); *see also* 25 U.S.C. § 1322 (concerning civil jurisdiction).[29] When these Amendments were passed, South Dakota was clearly a state "not having jurisdiction."[30] Indeed, South Dakota specifically assured Congress that this was the case. *See* p. 12 *infra*. Thus South Dakota needed, but did not obtain, tribal consent to secure the jurisdiction it claims here. 900 F.2d at 1174.[31]

The Court of Appeals also noted that the intent of Congress in the 1968 Amendments to bar state assertions of jurisdiction without tribal consent could not be defeated, "in the unique factual circumstances of this case," by retroactive application of this Court's decision in *Yakima*. 900 F.2d at 1172.[32] The Court of Appeals stated that

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[29] Likewise the 1968 Amendments repealed the provision of Public Law 280 (section 7), which authorized unconsented assertions of jurisdiction, except with respect to prior "cessions" of jurisdiction. South Dakota's argument that its 1961 Act was a "cession" of jurisdiction preserved in the 1968 Amendments ignores the fact that the 1961 Act was void under its own Supreme Court's ruling in *Hankins*.

[30] As matters stood in 1968, South Dakota's own Supreme Court had voided the 1961 Act, *In re Hankins*, 80 S.D. 435, 125 N.W.2d 839 (1964), its citizens had overwhelmingly rejected Public Law 280 by referendum and its executive branch exercised no jurisdiction over Indian country.

[31] Retrocession is not an issue here. South Dakota argues (Pet. pp. 24-26) that once it enacted the 1961 Act, it could not retrocede such jurisdiction, because federal law did not specifically provide for retrocession before 1968. *See Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1986). But once *Hankins* was decided, South Dakota had nothing to retrocede. The 1961 Act was void and was not being enforced. South Dakota had no jurisdiction.

[32] This portion of the Court of Appeals' opinion is an alternative conclusion, providing that even if—contrary to the Court of Appeals' express holding—the 1961 South Dakota Act comported with the principles of *Yakima*, it would nevertheless be contrary

principles of retroactivity would not mandate application of *Yakima* in a manner which would reverse the long-standing "jurisdictional history" [33] and undermine the intervening "change in the Congress' offer of jurisdiction to the states." 900 F.2d at 1173.[34] *See e.g., Chevron Oil Company v. Huson*, 404 U.S. 97, 107 (1971).

Here the tribes and the federal government exercised jurisdiction both before and after the 1968 Amendments and the state deferred to federal and tribal authority. Moreover, in their testimony leading up to the 1968 amendments to Public Law 280, state officials informed Congress that South Dakota had not acquired any jurisdiction under Public Law 280 and that the state sought a tribal consent provision, rather than repeal of Public Law 280, as urged by the tribes. Congress acted in reliance on that testimony when it amended Public Law 280, as described below.

Beginning in 1961,[35] the Senate Judiciary Committee's Subcommittee on Constitutional Rights, chaired by Sena-

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to the 1968 Amendments for South Dakota to assume jurisdiction now without tribal consent. As noted above, the Court of Appeals clearly applied the principles of *Yakima* to South Dakota's attempt to assert jurisdiction, and held that the 1961 Act violated Public Law 280. 900 F.2d at 1169-73.

[33] *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 603-05 (1977); *DeCoteau v. District County Court*, 420 U.S. 425, 442-43 (1975).

[34] *Yakima* did not involve an attempt by Washington State to change the *status quo*, or any issue regarding an intervening change by Congress in the conditions under which jurisdiction was offered to states.

[35] From the time Public Law 280 was enacted in 1953, there was widespread concern over the law's failure to require tribal consent. When he signed the measure, President Eisenhower expressed "grave doubts" and specifically urged Congress to amend Public Law 280 to provide consultation with tribes prior to assertions of jurisdiction. Quoted in 114 Cong. Rec. 9112 (1968); 900 F.2d at 1171.

tor Ervin,[36] held extensive hearings which led to passage of the 1968 Amendments. The South Dakota Assistant Attorney General testified at these hearings, urging Congress *not* to repeal Public Law 280 as requested by the tribes, but rather to amend it to allow future assertions of state jurisdiction only with tribal consent:

> The Indians of South Dakota have strenuously opposed Public Law 83-280 because of the lack of the Indian consent clause and have asked that the existing law be repealed.
>
> Attorney General Farrar agrees that a form of an Indian consent clause should be made a part of the existing law on jurisdiction in the Indian country, but does not agree that it is necessary to repeal Public Law 280 as S. 966 would do. Rather, he is of the opinion that the existing law should be amended to add thereto the Indian consent clause.

1965 Hearings, supra n.14, at 112 (remarks of South Dakota Assistant Attorney General Andre).

At these hearings, South Dakota's Assistant Attorney General specifically denied that South Dakota had *any* Public Law 280 jurisdiction:

> Senator Ervin. Did the State of South Dakota assume jurisdiction under Public Law 83-280?
> Mr. Andre. No, sir.

Id. at 117.[37] South Dakota's congressional delegation likewise expressly advised Congress that South Dakota had no

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[36] The 1968 Amendments were "offered and principally sponsored by Senator Ervin. . . .", *Kennerly v. District Court of Montana*, 440 U.S. 423, 429 (1971).

[37] South Dakota argues (Pet., pp. 28-33) that this legislative history—including South Dakota's own representations to Congress—should be ignored. *Id.*, p. 32 n.3. This Court has mandated that federal Indian legislation be construed consistent with representations made to Congress in the legislative process. *Morton v. Ruiz*, 415 U.S. 199 (1974).

Public Law 280 jurisdiction, and that they joined the people of South Dakota in rejecting such jurisdiction unless secured with tribal consent. *1965 Hearings, supra* n.14, at 16 (Senator McGovern); *1968 Hearings, supra* n.14 at 35 (Congressman Reifel).[38]

Instead of adopting the Tribes' proposal to repeal Public Law 280 outright, Congress relied on South Dakota's representations and did precisely what South Dakota urged—it amended Public Law 280 to require tribal consent. South Dakota should not now be heard to argue that it may assert jurisdiction based on the 1961 Act it told Congress was invalid, or that it may assert such jurisdiction without complying with the very tribal consent provision South Dakota sought and obtained from Congress. The Court of Appeals properly concluded that Congress in the 1968 Amendments to Public Law 280 barred "any further nonconsenual assumptions of jurisdiction, through any means," 900 F.2d at 1172, including South Dakota's current claim to jurisdiction. That conclusion requires no review by this Court.

CONCLUSION

The Court of Appeals' ruling presents no conflict, raises no general issue, and properly applies well-settled principles of this Court construing Public Law 280. Moreover, the Court of Appeals' ruling avoids the inequities which would result if the longstanding jurisdictional ar-

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[38] Senator McGovern testified that both he and Senator Mundt had publicly supported the 1964 referendum to defeat South Dakota's attempt to take jurisdiction without tribal consent. He endorsed the 1968 tribal consent provision as

> an extension of a great principle of democratic government—that the leaders must obtain the consent of those governed.

1965 Hearings, supra n.14, at 16. Likewise, Congressman Reifel, a member of the Rosebud Sioux Tribe, and former longtime Bureau of Indian Affairs official, testified that he had joined with the citizens of the State rejecting Public Law 280 by referendum. *1968 Hearings, supra* n.14, at 35-36.

rangement on South Dakota Indian reservations was reversed and the 1968 tribal consent Amendment, which South Dakota asked Congress to adopt, was held not applicable to South Dakota.

The petition for writ of certiorari should be denied.

Respectfully submitted,

SCOTT B. MCELROY
GREENE, MEYER & MCELROY, PC
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
(303) 442-2021
Counsel for
Cheyenne River Sioux Tribe

TERRY L. PECHOTA
FINCH, VIKEN, VIKEN
& PECHOTA
304 Main—P.O. Box 2934
Rapid City, South Dakota 57709
(605) 348-6547
Counsel for
Rosebud Sioux Tribe

WILLIAM R. PERRY *
REID PEYTON CHAMBERS
SONOSKY, CHAMBERS & SACHSE
1250 Eye Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 682-0240
Counsel for
Standing Rock Sioux Tribe

MARVIN AMIOTTE
P.O. Box 1053
Pine Ridge, South Dakota 57770
(605) 867-5140
Counsel for Oglala Sioux Tribe

* Counsel of Record

APPENDIX

APPENDIX

APPENDIX

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

#16644

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

PETER SPOTTED HORSE, JR.,
Defendant and Appellant.

Appeal from the Circuit Court of the
Fifth Judicial Circuit
Walworth County, South Dakota

HONORABLE LELAND J. BERNDT
Judge

JOHN P. GUHIN
Deputy Attorney General
Pierre, South Dakota

On the brief:

ROGER A. TELLINGHUISEN
Attorney General
Pierre, South Dakota

Attorneys for plaintiff and appellee.

RANDOLPH J. SEILER of
SEILER & CAIN
Mobridge, South Dakota

Attorneys for defendant and appellant.

Argued January 9, 1990

Opinion Filed Oct. 4, 1990

MORGAN, Justice.

Peter Spotted Horse, Jr. (Spotted Horse) appeals[1] a judgment rendered on a jury verdict convicting him of driving while under the influence of an alcoholic beverage (DUI) and failure to display current registration. We affirm in part and reverse and remand in part.

FACTS

On April 1, 1988, Spotted Horse, an enrolled member of the Standing Rock Sioux Tribe who resided on the reservation, was driving off the reservation in the town of Mobridge, South Dakota. His car was not displaying valid 1988 license plate stickers, in violation of SDCL 32-5-98 (a Class 2 misdemeanor). Seeing this violation, Mobridge City Police Officer Roger Krone (Krone) attempted to stop the vehicle by turning on the red revolving light on top of his patrol car. This attempted stop occurred within the boundaries of the municipality of Mobridge.

Spotted Horse did not stop. Instead, he drove across the Missouri River bridge and onto the Standing Rock Sioux Reservation (reservation). Krone continued the pursuit with his siren running and red light flashing. The chase reached speeds ranging from 90 mph to 109 mph.[2] Spotted Horse proceeded north on Highway 1806,

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[1] The Standing Rock Sioux Tribe filed an amicus curiae brief in support of Spotted Horse.

[2] Justice Dunn, concurring specially in State v. Seidschlaw, 304 N.W.2d 102, 107-08 (S.D. 1981), expressed well our opinion about these high-speed chases over minor traffic offenses.

> "I realize that in the presence of a violation of the law it is the duty of an officer to take steps to suppress the offense and apprehend the violator; however, this must be done within the

driving seven or eight miles onto the reservation. Spotted Horse then turned off of Highway 1806 and drove within the city limits of the town of Wakpala, then into a housing area, and onto a private driveway or yard. Krone continued following Spotted Horse the entire time, never losing sight of him.

Once Krone exited his police car, Spotted Horse began to drive away again. Krone ran to the vehicle, reached inside and shut off the ignition. There were two adults and two children in the car. Krone informed Spotted Horse that he did not have "current [license] plates" on his car and told him numerous times to get out of the car. Spotted Horse refused. Krone started pulling on Spotted Horse's arm to extract him from the car. The ensuing struggle went on for anywhere from five to fifteen minutes during which time Krone struck Spotted Horse three or four times with his nightstick, several of the blows hitting Spotted Horse in the head and cheek. Finally, Krone pulled Spotted Horse from the car by his hair or his left shoulder and upper arm, threw him to the ground on his stomach, put his knee on his back and handcuffed him. Following the handcuffing, Krone lifted Spotted Horse by the arms and placed him in the police car.

Spotted Horse was then taken back to Mobridge. On the ride back, Krone noticed the smell of alcohol on Spotted Horse's breath. After arriving back at the station in Mobridge, Krone administered the field sobriety test to Spotted Horse, which he failed. Following the test, Krone arrested Spotted Horse for DUI and read him the implied consent warnings. Spotted Horse agreed to take a blood test and was taken to the Mobridge Hospital for the extraction of blood. The BAC was 0.244.

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limits of rationality. Here the acts of these officers has brought them to the very edge of this precipice of rationality and may even have plunged them over that edge."

Spotted Horse was charged with five counts: (1) eluding police in violation of SDCL 32-33-18 (Class 1 misdemeanor); (2) driving while under the influence in violation of SDCL 32-23-1 (Class 1 misdemeanor); (3) resisting arrest in violation of SDCL 22-11-4 (Class 1 misdemeanor); (4) driving without a license in violation of SDCL 32-12-22 (Class 2 misdemeanor); and (5) failure to display current registration in violation of SDCL 32-5-98 (Class 2 misdemeanor). After a jury trial, Spotted Horse was convicted of Counts 2 and 5, driving under the influence and failure to display current registration. He was acquitted of Counts 1 and 3, eluding police and resisting arrest.[3]

ISSUES

1. Did the trial court err in ruling that the State had jurisdiction to try an Indian who committed a misdemeanor off the reservation, but who fled to the reservation and was arrested by a municipal police officer on the reservation?

2. Did the trial court abuse its discretion in not suppressing evidence of unrelated crimes where the defendant alleged use of excessive force in making the arrest?

3. Did the trial court abuse its discretion in failing to suppress the blood test given to defendant because the blood was extracted by an LPN with expanded training?

ANALYSIS

We begin by discussing the appropriate standard of review. The jurisdictional challenge raised by this appeal involves the application and effect of SDCL 1-1-18 and 1-1-21, and procedural compliance with Public Law 280.

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[3] The fourth charge, driving without a license, was dismissed during trial.

Because issues regarding the removal of constitutional disclaimers of state jurisdiction are questions of state law, they are reviewed de novo by this court. *See* Brown v. Egan Consol. School Dist. #50-2, 449 N.W.2d 259 (S.D. 1989); Beville v. University of S.D. Bd. of Regents, 420 N.W.2d 9 (S.D. 1988). However, the question of substantive compliance with PL 280, *i.e.*, the validity of retrocession of PL 280 jurisdiction, is a question of federal law. Tyndall v. Gunter, 840 F.2d 617, 618 (8th Cir. 1988). With these standards in mind, we begin with Spotted Horse's argument that State lacked jurisdiction to make arrests on the reservation.

1. Jurisdiction

To understand our ultimate conclusion, it is necessary to briefly retrace the intermittent nature of state jurisdiction over reservations. In 1953, Congress passed Public Law 280,[4] which gave disclaimer[5] states, such as South Dakota, statutory power to assume and exercise civil and criminal jurisdiction over reservations if they passed legislation to accept jurisdiction. State v. Onihan, 427 N.W.2d 365, 367 (S.D. 1988). Though South Dakota made efforts to pass legislation in 1957 and 1959 to fulfill this mandate, the legislation was ultimately ineffective. *See* In re High Pine, 78 S.D. 121, 99 N.W.2d 38 (1959); 1951 S.D. Sess. L. ch. 187; 1957 S.D. Sess. L. ch. 319; 1959 S.D. Sess. L. ch. 144, §§ 1, 2.

Then, in 1961, South Dakota passed SDCL 1-1-18[6]

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[4] Act of August 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1976)).

[5] The term "disclaimer state" designates those states which had constitutions or statutes containing organic law disclaimers of jurisdiction over Indian country. State v. Onihan, 427 N.W.2d 365, 367 (S.D. 1988).

[6] 1961 S.D. Sess. L. ch. 464, § 1. SDCL 1-1-18 provides:

> The state of South Dakota, in accordance with the provisions of 67 Statutes at Large, page 589 (Public Law 280), hereby assumes and accepts jurisdiction of all criminal offenses and

and SDCL 1-1-21,[7] wherein the legislature conditioned acceptance of civil and criminal jurisdiction on federal reimbursement. An exception was provided, however, whereby the State assumed jurisdiction over criminal offenses and civil causes of action on the highways without the requirement of federal reimbursement. The validity of this legislation is the lynchpin of this decision. Following the 1961 legislation, we held that these statutes were ineffective because the State could not assume partial jurisdiction over Indian country. *See* In re Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964). We then changed course for partial jurisdiction on the highways in *Onihan, supra*, after the United States Supreme Court held that the state of Washington had validly assumed partial jurisdiction over reservations in the case of Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979).

Now, we must reconsider our position again in light of the decision of the United States Court of Appeals in

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civil causes of action arising in the Indian country located within this state, as Indian country is defined by Title 18 United States Code, section 1151, and obligates and binds this state to the assumption thereof, the provisions of chapter 106 of the Session Laws of the state of South Dakota for 1901, as amended, or any other law of this state to the contrary, notwithstanding.

[7] 1961 S.D. Sess. L. ch. 464, § 4. SDCL 1-1-21 provides:

Except as to criminal offenses and civil causes of action arising on any highways, as the term is defined in chapter 31-1, the jurisdiction provided for in § 1-1-18 shall not be deemed assumed or accepted by this state, and §§ 1-1-18 and 1-1-20 shall not be considered in effect, unless and until the Governor of the state of South Dakota, if satisfied that the United States of America has made proper provision for the reimbursement to this state and its counties for the added costs in connection with the assumption of said jurisdiction, has issued his proper proclamation duly filed with the secretary of state declaring the said jurisdiction to be assumed and accepted.

Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164 (8th Cir. 1990). *Rosebud* reversed the district court's decision which had sustained the state's exercise of jurisdiction over highways running through reservations in the state, on two principal grounds. First, the 1961 legislation did not validly retrocede jurisdiction to the State within the terms of PL 280. The *Rosebud* court found that our decision in *Onihan* had misinterpreted *Yakima*, thereby improperly overruling the *Hankins* decision that the State lacked PL 280 jurisdiction. Speaking of the differences between the assumption of jurisdiction in *Yakima* versus our legislature's actions, the Eighth Circuit stated:

> The major concerns reflected in the passage of PL 280 were (1) to reduce the economic burden of federal jurisdiction over reservations, (2) to respond to a perceived hiatus in law enforcement on reservations, and (3) to assimilate Indians into the general population. *Yakima*, 439 U.S. at 498.
>
> We believe South Dakota's limited excursion into the area of Indian jurisdiction is not responsive to the concerns underlying the passage of PL 280. Jurisdiction over highways does not go very far in reducing lawlessness on reservations, but simply introduces a third party to the already complex jurisdiction pattern on reservations. It also does little to reduce federal presence on reservations since the federal government retains the financial burden of the majority of jurisdictional concerns. The Washington statute, which left open the possibility of complete jurisdiction upon tribal consent, reflected an acceptance of the burden of jurisdiction, as well as an attempt to accommodate tribal self-governance. The state's partial jurisdiction assumption here represents the contrary result. We believe that the failure to assume jurisdiction in a manner consistent with the purposes of PL 280 is not sufficient "action

> within the terms of the offer made by Congress to the States in 1953."

900 F.2d at 1170-71 (footnotes omitted).

Second, the Eighth Circuit found that Congress, by amending PL 280 in 1968 [8] and requiring tribal consent to any new assumption of jurisdiction, vested the interests of the tribes in self-government and precluded South Dakota from enforcing its 1961 legislation because it was improper to apply *Yakima* retroactively. The court explained:

> The Tribes, particularly in South Dakota, have relied on the protection offered by the tribal consent amendment since 1968. The Tribes have co-existed with state authorities with the knowledge that the state could not assume jurisdiction over them without their consent. The state allowed federal and tribal authorities to exercise jurisdiction prior to and after 1968 without asserting its claim to jurisdiction. Retroactive application of the *Yakima* interpretation of PL 280 to revive South Dakota's 1961 legislation would disregard the manner in which the Tribes and the state have structured their jurisdictional relationship.
>
> * * * *
>
> [T]he congressional intent in passing the 1968 amendment did not contemplate that a subsequent, retroactive application of a change in statutory interpretation could alter South Dakota's lack of jurisdiction existing at the time of the repeal of section 7.

900 F.2d at 1173, 1174. Accordingly, South Dakota does not have jurisdiction over Indian country, nor may the

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[8] Act of April 11, 1968, Pub. L. 90-284, Title IV, § 403, 82 Stat. 79 (codified at 25 U.S.C. § 1323 (1983)).

State exercise partial jurisdiction over highways running through the reservations.

Since South Dakota had no jurisdiction on the reservation, our fresh pursuit statute could not reach onto the reservation and we are left with the question: What effect did Krone's incursion onto the reservation have on the trial of Spotted Horse?

We first consider Spotted Horse's argument that the trial court lacked jurisdiction to try him on the charges. He acknowledges our holding in State v. Winckler, 260 N.W.2d 356 (S.D. 1977), where we said:

> When a person accused of a crime is found within the territorial jurisdiction wherein he is so charged and is held under process legally issued from a court of that jurisdiction, neither the jurisdiction of the court nor the right to put him on trial for the offense charged is impaired by the manner in which he was brought from another jurisdiction, whether by kidnapping, illegal arrest, abduction, or irregular extradition proceedings.

Id. at 363 (citing 4 Wharton's Criminal Procedures § 1484, at 39-40 (1957)). This rule, the Ker-Frisbie rule, is an adaptation of the rules of Ker v. Illinois, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886) and Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed 541 (1952), originally adopted by this court in an earlier decision, State v. Thundershield, 90 S.D. 391, 399, 242 N.W.2d 159, 163-64 (1976). Spotted Horse urges us to reexamine our holding in *Winckler* in light of the authority found in United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

In *Winckler* the offense charged, assault with a dangerous weapon without intent to kill, was committed by the Indian defendants firing guns from trust land at officers who were outside the trust land. The defendants surrendered to an officer of the B.I.A. police, who then

simply turned them over to State authorities for prosecution. In comparison, the defendant in *Toscanino* alleged that he was kidnapped in Uruguay by American agents, tortured, and abducted to the United States for the purpose of prosecution here. The *Winckler* decision referred to our *Thundershield* decision and eschewed *Toscanino*. *Thundershield* involved an extradition technicality, a purely statutory violation, not claimed to be of constitutional dimension.

More recently we applied the same rule in Quiver v. State, 339 N.W.2d 303, 305 (S.D. 1983), referring to it as the *Ker* rule. In *Quiver*, no Indian jurisdiction was involved; rather it was a question of procedurally incorrect extradition from Nebraska.

In the context of Indian jurisdiction cases, the rule found in *Ker* and *Frisbie* was criticized by the New Mexico Supreme Court in Benally v. Marcum, 89 N.M. 463, 553 P.2d 1270 (1976). Citing *Toscanino*, the decision first noted the expansion of the concept of due process to protect the accused against pretrial illegality. The decision went on to point out how the Navajo tribe "has provided specific procedures for extraditing persons accused of crime from the reservation" and the Navajo tribal government's exercise of the sovereign power vested in them. 89 N.M. at ——, 553 P.2d at 274.

Although we find Spotted Horse's case can be factually distinguished from *Thundershield*, *Winckler* and *Quiver*, and it is a very close case based on the actions of the police officer, we are not persuaded to abandon our rule at this time. Even though Krone chased defendant at breakneck speeds which were unwarranted considering the nature of the violation (expired license plate stickers), and engaged in a battle using his night stick, his actions cannot be equated with torture. No doubt, in pursuing Spotted Horse, Krone was relying, to some degree, on our decision in *Onihan*. Further, because the record reflects that the Standing Rock Sioux Tribe has

not enacted into their tribal code any provisions for extradition, we are left with the firm conviction that, at least for the present, we should retain our established rule. Thus, we hold that the trial court had jurisdiction over Spotted Horse for the purpose of trial.

In arriving at this decision, we are also aware of the discussion in *Toscanino, supra,* wherein the court discussed the development of the concept of due process "which now protects the accused against pretrial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part." 500 F.2d at 275. The court went on to point out:

> Although the issue in most of the cases forming part of this evolutionary process was whether evidence should have been excluded (e.g., *Mapp, Miranda, Wong Sun, Silverman*), it was unnecessary in those cases to invoke any other sanction to insure that an ultimate conviction would not rest on governmental illegality.

Id.

We then examine the correlative issue, whether the evidence, particularly the field sobriety test and the blood test results, resulting from Spotted Horse's arrest were admissible at trial. Although Spotted Horse raises no issue on the admissibility of the field sobriety tests, and only challenges the admission of the blood tests on statutory grounds regarding the drawing of the blood sample, we review this very important issue under the doctrine of plain error. SDCL 23A-44-15. Under the doctrine of Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the exclusionary rule generally makes inadmisisble against the defendant evidence that is the product of an unconstitutional arrest. As the court explained in *Wong Sun,* the purpose of the rule is to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the per-

son. The exclusionary prohibition extends to indirect as well as direct evidence; physical tangible materials obtained either during or as a direct result of an unlawful invasion, come at by exploitation of the illegal search; and testimony of matters observed during an unlawful invasion to enforce the basic constitutional policies. The seizure of Spotted Horse by Krone was clearly a violation of Spotted Horse's Fourth Amendment rights, thus suppression would seem to be automatic. However, there are some jurisdictions which have made some distinctions whereby the admission of such evidence has been permitted.

In People v. Wolf, 635 P.2d 213 (Colo. 1981), the Denver police made a stakeout and arrest in an adjoining county, beyond their jurisdiction, collected evidence, and turned the case over to the local authorities for prosecution. The Colorado Supreme Court determined that the police had the power to make a citizen's arrest where probable cause existed. The court went on, however, to caution that in cases where the police act in willful disobedience of the law, the courts have not hesitated to use their supervisory powers to exclude evidence. *Id.* at 217.

Here, Krone was not in the process of making a citizen's arrest, assuming such an arrest is possible under tribal ordinances. The violation for which he was initially and principally making the arrest, failure to display current vehicle registration, was not even an offense triable on the reservation. With respect to the DUI offense, Krone did not follow proper procedures. He transported Spotted Horse back to Walworth County for trial rather than turn him over to tribal authorities. Likewise, in City of Kettering v. Hollen, 416 N.E.2d 598 (Ohio 1980), the Ohio Supreme Court, in a rather shallow opinion, determined that the exclusionary rule was not applicable to a DUI defendant arrested by a Kettering police officer in adjoining Dayton. The officer was engaged in hot pursuit. Nevertheless, the court assumed from an insufficient record that the arrest was unau-

thorized. The court held that the exclusionary rule, applicable for violations of a constitutional nature only, would not be applied to evidence which is the product of police conduct violative of *state law*, but not violative of constitutional rights. *Id.* at 600. Because we view Krone's actions in pursuing Spotted Horse down the reservation highway, into the housing area and onto his front lawn to be a constitutional violation, far above simple statutory violations, we hold that the evidence attained by the unconstitutional arrest is not admissible against Spotted Horse. We therefore reverse the conviction for driving under the influence.

However, since the failure to display current registration offense was committed off the reservation, and independent evidence was obtained through Krone's observation before the illegal arrest, we affirm the verdict on this offense. *Winkler*, *supra* (manner of arrest, even including illegal arrest on reservation, does not bar prosecution).

That issue decided, we feel compelled to comment on the need for a solution to this gap in criminal jurisdiction. When a crime is committed off the reservation and criminals can flee unimpeded onto the reservation, both Indians and non-Indians alike are harmed. We would hope that in this year which the Governor has proclaimed "The Year of Reconciliation," that both tribal leaders and governmental officials will sit down and work out treaties that will remedy this situation.

2. Suppression of Evidence

Next, because Spotted Horse's conviction on expired license plates is preserved, we consider his argument that Krone's use of excessive force in making the arrest was a violation of SDCL 23A-3-5 [9] and required suppression of

[9] SDCL 23A-3-5 provides, in pertinent part: "No person shall subject an arrested person to more physical restraint than is reasonably necessary to effect the arrest[.]"

evidence on *all* charges or, in the alternative, a jury instruction providing that an illegal arrest provided a defense to *all* the charges.

Before we may reverse the trial court on a motion to suppress, Spotted Horse must demonstrate that the trial court abused its discretion in not suppressing the evidence. State v. Bartlett, 411 N.W.2d 411, 414 (S.D. 1987). Spotted Horse fails to meet this burden.

We begin by noting that there is a paucity of evidence that supports Spotted Horse's contention that he was brutally beaten. Also, Spotted Horse conveniently does not mention his resistance in leaving his car. Faced with this dearth of evidence, the trial court did not abuse its discretion in refusing to give the instruction or suppressing the evidence. *Bartlett, supra.* Furthermore, we can find no precedent for an exclusionary rule that would extend suppression of evidence to *unrelated* offenses and the cases cited by Spotted Horse certainly do not warrant this conclusion.

Contrary to Spotted Horse's contention, State v. Gage, 302 N.W.2d 793 (S.D. 1981), merely stands for the proposition that insufficient information in an affidavit for a warrant deprived the police of probable cause and thereby makes an arrest illegal. As we noted earlier, even though the arrest on the reservation was illegal, that does not prevent prosecution on the failure to display current registration sticker offense. *Winckler, supra.*

Nor does Brown v. Wyman, 224 Mich. 360, 195 N.W. 52 (1923), stand for the proposition that excessive force invalidates an arrest. *Brown* is a civil case that awarded civil damages to a plaintiff who was struck in the face with a black jack by a sheriff making an arrest. Instead of supporting Spotted Horse's argument, *Brown* points to Spotted Horse's proper remedy—a civil suit for damages, not application of the exclusionary rule.

Nor is State v. Rich, 417 N.W.2d 868 (S.D. 1988), support for creation of a new exclusionary rule. *Rich* involved an assault by a private citizen and the availability to the defendant of the privilege of self-defense or defense of another. Nothing within the decision supports this novel expansion of the exclusionary rule that Spotted Horse now urges.

Finally, contrary to Spotted Horse's argument, United States ex rel. Means v. Solem, 646 F.2d 322 (8th Cir. 1980), stands only for the proposition that a defendant may be entitled to a self-defense instruction or defense of others in a riot situation if excessive force is used. It does not stand for, nor can we find, any precedent that states that a defendant is entitled to an acquittal on *unrelated* charges if excessive force is used during an arrest. Sufficient deterrence to police misconduct is provided if the excessive force invalidates a resisting arrest charge. Further, Spotted Horse would be entitled to pursue civil remedies against the officer. These two factors together provide a more than sufficient remedy for this type of conduct.

Because we have suppressed the blood test as the fruits of an illegal arrest, Spotted Horse's third issue is moot.

DECISION

Therefore, we reverse the trial court on the conviction for DUI and affirm on the conviction for failure to display current registration and instruct the trial court to enter an order in conformity with this opinion.

MILLER, Chief Justice, WUEST and SABERS, Justices, concur.

HENDERSON, Justice, concurs specially.

HENDERSON, Justice (specially concurring).

As one reads through the thread of the majority opinion, it becomes obvious that this Court, and thus this State, is enlightening itself by (a) having its decisions reversed and (b) finally recognizing that there is a tribal sovereignty concept which spreads across the reservations, not only in South Dakota, but across this nation.

To have condoned this officer's jurisdiction, on a private driveway, where the defendant was arrested, would be granting authority unto law enforcement officers in this state defying the recognition of tribal sovereignty and independence. Such recognition would simply cause the mandates of Public Law 280 to be a nullity. Therefore, I concur in the majority's holding reversing the DUI conviction.

As I concur in this opinion, I call attention to my special concurrence in State v. Onihan, 427 N.W.2d 365 (S.D. 1988):

> As one continues to struggle in reading the law, it is perceived that gradations of jurisdiction exist, not to mention variances, as the type of Indian jurisdiction cases surface in the appellate bodies. Specifically, in this type of case, basic questions should be asked: Does this case involve tort law? Family law? Criminal law? If the latter, does the case pertain to one of the major crimes? *See* 18 U.S.C. § 1153. Or are we just considering a minor crime? An analysis must further encompass the specific situs of the facts giving rise to the litigation. One must consider: Are the parties Indian or non-Indian? Does the Indian Child Welfare Act apply? Two authors, Davis H. Getches and Charles F. Wilkinson, in their treatise, Federal Indian Law (2d ed. 1986), write that the jurisdictional maze in criminal cases can be "walked with some confidence" when an analytical approach is followed. *Supra*, at 412. Briefly, their analysis contains these steps:

1. Was the locus of the crime in Indian Country?
2. Does Public Law 280 or a specific jurisdictional statute apply? Here, Public Law 280 is governing.
3. Was the crime committed by or against an Indian?
4. Which Defendant-Victim category applies? This question includes "victimless" and "consensual" crimes.

See Federal Indian Law, supra, at 412-15.

This point I try to make: Jurisdiction depends upon many factors. History of the particular reservation involved,[1] as well as legislative enactments of the particular state, likewise play a vital role. Each case must be scrutinized to determine where jurisdiction lies. Indian jurisdiction is a complex subject and is not ordinarily amenable to black and white solutions. There are many areas of gray in this kind of litigation. Overlaying all of the above is the shifting sand of federal policy which spawns further complicated and knotty difficulties and entanglements. One law review article has characterized Indian policy as having "vacillated between assimilation, annihilation, and self-determination." Note, Recognition of Tribal

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[1] South Dakota has nine Indian Reservations, and each has an active tribal court. Seven have tribal courts which originate in a tribal sovereignty predating the United States Constitution. Two tribal courts are derived from the federally created Courts of Indian Offenses. These tribal courts are all subject to Congressional authority. *See generally* F. Pommersheim, South Dakota Tribal Court Handbook (March 1988). The Sisseton-Wahpeton Sioux Reservation, formerly the Lake Traverse Indian Reservation, was technically terminated as a "reservation" in 1891, but retains some attributes of reservation status. *See* DeCoteau v. District County Court, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975).

Decisions in State Courts, 37 Stan.L.Rev. 1397, 1399 (1985).

I wish to further call attention to my concurring in result in Wells v. Wells, 452 N.W.2d 123 (S.D. 1990).

As I pen my legal thoughts, a wave of legal concern comes upon my spirit. For over one decade, I have attempted to recognize the Indian community's struggle for social and governmental autonomy, as well as justice for our Red Brothers in this State's courts. State v. Chief Eagle, 377 N.W.2d 141 (S.D. 1985), Henderson, J., dissenting. Comity and mutual respect to the decisions of tribal courts has been a long time message of mine. *Mexican.* I have in the past, and now, recognize that in South Dakota we have tribal and state court systems. As found in the 1990 Legislative Senate Journal (pg. 60, 2nd legislative day), our present Governor has declared this year to be a Year of Reconciliation, requesting Indians and non-Indians to come closer together. Our Governor has asked us to set goals, to make strides toward better understanding in 1990. He is quoted in an article on page 2 of the Rapid City Journal, January 12, 1990 as follows: "The end result should not only be fun, but mutual respect and trust." Chairperson, Judy Petersen, who acts as the "Chairman" of the Flandreau Sioux Tribe, observed that the gathering should go beyond pure enjoyment. Governor Mickelson thus appeared before the State Indian Affairs Commission on January 11, 1990 in an attempt to bring together the Indian and white community in a spirit of friendship. *Id.* pg. 1.

On February 1, 1990, Governor Mickelson and representatives of eight of the state's nine Sioux Tribes began what has now been called the "Year of Reconciliation." The Governor sat cross-legged on the floor or our State Capitol rotunda and shared a peace

pipe with these Sioux representatives. Filled with legislators, state and tribal officials, the rotunda rang out with traditional Indian songs honoring the Indian people and expressing a hope for peace. *See*, Rapid City Journal, pg. 1, February 2, 1990.

This is the beginning of the second century of South Dakota statehood. It is good that Indians and whites now seek a year of racial understanding and a new beginning of peace with one another.

Alas, but hopefully only for a moment, as the tide of understanding ebbs and flows, South Dakotans read, via a February 3, 1990, Rapid City Journal article that our Governor has said: "We're not going to solve jurisdictional issues." He also expressed that jurisdictional disputes could not be settled by the State and tribes and should not be part of the 1990 Reconciliation effort. Disappointment was expressed by the Chairman of the Cheyenne River Sioux Tribe who observed that the gatherings should go beyond pure enjoyment thereof indicating that: "If he's (the Governor) not interested in jurisdictional things and the issues that are really tearing us apart, there is no sense trying to pull this thing together. It's rhetoric." However, other tribal leaders took a more positive approach after the reconciliation ceremony. Increased understanding by the non-Indians and Indians could bring about help and economic development, health care and education for Indian people, they asserted.

A deep wound exists in the State of South Dakota by virtue of jurisdictional disputes between tribal courts and state courts.[2] The Indians tell us that their inherent sovereignty pre-dates the Constitution of the United States. They want to decide cases,

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[2] This Spotted Horse decision is a tender leaf of hope; let us pray that it blossoms.

> within tribal courts, which involve their people and their children. State court actions which undermine the authority of tribal courts are an impermissible infringement upon the right of tribal self-government. Williams v. Lee, 358 U.S. 217, 223, 79 S.Ct. 269, 272. Let us, in the Year of Reconciliation, pursue all avenues of peace to included open-minded solutions to jurisdictional conflict between the Indians and non-Indians of this state.

I wrote specially in *Wells* because I was concerned with the sovereignty of tribal courts. In *Wells*, I called attention to a shining example of how this Court recognized the rights of Native Americans to care for and watch over and protect their own children in their own courts. In re Guardianship of D.L.L. & C.L.L., 291 N.W. 2d 278 (S.D. 1980) In that special writing, I quoted Federal Judge Bogue as expressing in Cheyenne River Sioux Tribe v. Kleppe, 424 F.Supp. 448 (D.S.D. 1977):

> . . . All too often courts seem to pay little more than lip service to the right and power of Indian people to govern themselves.

Again, in *Wells*, I admonished that Native American people should have jurisdiction over disputes between their own people on their reservations. I quote from my writing:

> If state court jurisdiction on Indians or activities on Indian land would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law. The United States Supreme Court in Iowa Mutual Ins. Co. v. LaPlante et al., 480 U.S. 9, 107 S.Ct. 971, 74 L.Ed.2d 10 (1987) declared, inter alia, 'We have repeatedly recognized the Federal Government's long standing policy of encouraging tribal self-government . . . Tribal courts play a vital role in tribal self-

> government (citation omitted), and the Federal Government has consistently encouraged their development.

Further, in *Wells*, I stated:

> Land within the limits of any Indian Reservation under jurisdiction of the United States Government is in Indian country. 18 U.S.C. § 1151.

I now note, come the dawn, that the majority opinion now expresses: "Accordingly, South Dakota does not have jurisdiction over Indian country nor may the state exercise partial jurisdiction over highways running through the reservations."

In *Wells*, I stated:

> South Dakota has long danced with Public Law 280. It has unsuccessfully attempted to conditionally or partially assume civil and criminal jurisdiction over Indians and Indian territory. *See*, In re High Pine, 99 N.W.2d 38 (S.D. 1959). Said decision overruled Chapter 391 of the Session Laws of 1957 which gave South Dakota criminal and civil jurisdiction over Indian land. Another key decision in this Court is In re Hankin's Petition, 125 N.W.2d 839 (S.D. 1964). In *Hankin*, chapter 464 of the Session Laws of 1961 was ruled inconsistent with the congressional purposes of Public Law 280. There has been a historic struggle by the State Legislature with the Congress of the United States to acquire, in one fashion or the other, state jurisdiction to supplant inherent tribal sovereignty. In the end, the Crow Creek Tribe has a right to make and enforce its own laws subject only to the will of Congress. The members of this Court cannot manifest a power, by broad language, to carte blanche assume jurisdiction over controversies between the Indians exclusively arising within the borders of their own reservation.

Hearken unto the words of a unanimous United States Supreme Court decision, United States v. Mazurie, 419 U.S. 554, 556, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975), reversing a 1973 Tenth Circuit Court decision as found at 487 F.2d 14. Speaking through Justice Rehnquist the highest court of this land stated:

> This Court has recognized limits on the authority of Congress to delegate its legislative power. . . Those limitations are, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter . . . Thus, it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, they are a 'separate people,' possessing 'the power of regulating their internal and social relations . . .'

Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

I wish to point out that this arrest was a reckless arrest and did not justify a 109 mile per hour pursuit, all mind you, arising from an invalid license plate sticker, a class two misdemeanor. This Native American defendant was arrested some 7 to 8 miles within the reservation, on a private driveway (his own). This area was expressly outside the scope of the jurisdictional mandate of SDCL 1-1-21 and SDCL 31-1-1. No action has ever been taken to acquire jurisdiction over a privately owned driveway and yard some 8 miles within the territorial boundary of an Indian Reservation in South Dakota. There are no federal statutes currently authorizing fresh pursuit by state officers onto an Indian Reservation. True, the primary concern of Congress in enacting Public Law 280 was to deal with the problem of lawlessness and the absence of adequate law enforcement on certain

reservations. *See, Rosebud Sioux Tribe v. South Dakota,* 709 F.Supp. at 511. This does not, however, absolve the State of South Dakota from meeting the requirements imposed by federal law to attain such goals.

In Benally v. Marcum, 553 P.2d 1270, 1273 (N.Mex. 1976), the New Mexico Supreme Court held that state courts could not try Native Americans who are arrested on a reservation for an off-reservation crime. Perhaps that is good authority for reversing the invalid license plate sticker conviction. However, this Court's analysis is based upon *Winkler,* a contrary viewpoint. So we are standing upon 1977 precedent. Is that precedent sound? Is it sound when one considers the more recent decisions in the federal courts? I full well understand that the majority opinion believes the offense was committed off the reservation and the officer could see the plates. Hence, though an illegal arrest, we can, so the majority says, affirm the verdict on this offense. An arrest such as this should also be the subject of future efforts between Native Americans and the white legal community. It could well be that this arrest is another "gap in criminal jurisdiction." Certainly, this type of scenario is no novelty in South Dakota.

Accordingly, I now welcome the other four members of this Court to my views on reconciliation, *including jurisdiction,* so that Native Americans and the white community can gather in the spirit of giving and understanding which would trigger the elimination of prosecutorial clouds. In the immortal words of Isaiah "Come, let us reason together."

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

#16644

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs.

PETER A. SPOTTED HORSE,
Defendant and Appellant.

ORDER DENYING MOTION
FOR RELIEF FROM DEFAULT

[Filed Nov, 3, 1990]

Plaintiff having served and filed a motion for leave to file a petition for rehearing in the above-entitled matter after expiration of the twenty-day period provided therefor by SDCL 15-30-4, and the defendant having served and filed a response thereto, and the Court having considered the motion and response and having determined that the time within which a petition for rehearing may be served and filed is jurisdictional, now, therefore, it is

ORDERED that said motion be and it is hereby denied.

DATED at Pierre, South Dakota, this 8th day of November, 1990.

BY THE COURT:

/s/ Robert A. Miller
ROBERT A. MILLER
Chief Justice

ATTEST:

/s/ Gloria A. Engel
Clerk of the Supreme Court

[SEAL]

(4)

No. 90-749

APR 16 1991

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF SOUTH DAKOTA, ET AL., PETITIONERS

v.

ROSEBUD SIOUX TRIBE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

EDWARD J. SHAWAKER
ANNE S. ALMY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the State of South Dakota successfully assumed jurisdiction under Public Law 280 by passage in 1961 of a statute that provided for state jurisdiction only over events occurring on highways in Indian country and that did not provide for assumption of full jurisdiction at the request of the Tribes.

2. If so, whether the 1961 statute remained in effect after enactment of the Indian Civil Rights Act of 1968 (which added a requirement of tribal consent to further state assumptions of jurisdiction under Public Law 280), even though at the time Congress was considering the 1968 Act South Dakota advised Congress that it was not exercising jurisdiction and that it did not believe it had jurisdiction, because the 1961 statute had been held invalid by the South Dakota Supreme Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-749

STATE OF SOUTH DAKOTA, ET AL., PETITIONERS

v.

ROSEBUD SIOUX TRIBE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In 1889, Congress passed the Enabling Act that enabled Washington, Montana, North Dakota, and South Dakota to become States. Act of Feb. 22, 1889, ch. 180, 25 Stat. 676 (Enabling Act). To provide for continued federal supervision of the Indian tribes located in the new States, Section 4 of the Enabling Act required that the constitutional conventions of the prospective States include in their constitutions, "by ordinances irrevocable without the con-

sent of the United States and the people of said States," provisions by which

> the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title * * * to all lands * * * owned or held by any Indian or Indian tribes; and that * * * said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

Enabling Act § 4, 25 Stat. at 677. In accordance with this provision, Article XXII of the South Dakota Constitution contains the same operative language.

2. In 1953, in response to the "problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement," *Bryan* v. *Itasca County*, 426 U.S. 373, 379 (1976), Congress passed the Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, commonly known as Public Law 280. The first five Sections of Public Law 280 ceded all criminal and civil jurisdiction over matters involving Indians in Indian country (with exceptions for certain specified reservations) to five named States (referred to as mandatory States), which did not include South Dakota. 67 Stat. at 588-590. Sections 6 and 7 granted all other States (referred to as option States) the option of assuming jurisdiction. First, Section 6 dealt with the problem faced by States (referred to as disclaimer States), such as South Dakota, whose constitutions prohibited any assumption of jurisdiction in provisions that could not be amended without the consent of the United States; Section 6 granted the consent of the United States to the people of any State to amend their constitutions "to remove any legal impediment to the assumption of civil and criminal jurisdiction." 67

Stat. at 590. Second, Section 7 dealt with all remaining States, providing consent for them "to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislation, obligate and bind the State." *Ibid.* Most importantly, Public Law 280 did not require the consent of the Indian tribes as a condition to the assertion of state jurisdiction.[1]

3. South Dakota has responded to Public Law 280 with four separate statutes, each of which attempted to accept all or part of the jurisdiction described in Public Law 280. For various reasons, three of those statutes no longer are in effect. See Pet. 5-6, 8 (discussing 1957, 1959, and 1963 statutes). This case involves the remaining statute, which was passed in 1961. The statute provided for immediate assumption of jurisdiction "as to criminal offenses and civil causes of action arising on any highways," and for complete assumption of all criminal and civil jurisdiction upon a proclamation by the governor that the federal government "has made proper provision for the reimbursement to [South Dakota] for the added costs in connection with the assumption of said jurisdiction." S.D. Codified Laws Ann. 1-1-21 (1985). Because the governor has not issued such a proclamation, this statute effectively assumed only jurisdiction related to highways.

Pursuant to the 1961 statute, South Dakota apparently exercised jurisdiction over highways in Indian country from 1961 to 1964. In 1964, however, the South Dakota Supreme Court, applying federal law, ruled that the 1961 enactment was invalid be-

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[1] For a general discussion of Public Law 280, see *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 471-474 (1979).

cause it did not comply with Public Law 280. *In re Hankins*, 80 S.D. 435, 125 N.W.2d 839 (1964). The two principal bases for the court's holding were, first, its conclusion that Public Law 280 did not authorize assumption of jurisdiction "over only a portion or part of a reservation," 80 S.D. at 442, 125 N.W.2d at 843, and, second, its view that the 1961 statute, by virtue of its being limited to highways, did not serve the purposes of Public Law 280. Instead, "it would proliferate the law enforcement authorities in Indian country by adding the state as another entity with geographically limited jurisdiction." 80 S.D. at 443, 125 N.W.2d at 843. Accordingly, South Dakota ceased enforcing the 1961 statute in 1964.[2]

4. During the 1960's, Congress became dissatisfied "with the involuntary extension of state jurisdiction over Indians who did not feel they were ready to accept such jurisdiction, or who felt threatened by it." *Three Affiliated Tribes* v. *Wold Engineering, P.C.*, 476 U.S. 877, 892 (1986); see Pet. App. A30-A32. In response to this and other concerns, Congress in 1968 enacted Title IV of the Civil Rights Act of 1968, commonly known as the Indian Civil Rights Act, Pub. L. No. 90-284, 82 Stat. 73, codified at 25 U.S.C. 1301 *et seq.* Sections 401(a) and 402(a), 25 U.S.C. 1321(a) and 1322(a), established a new rule for assumption of criminal and civil jurisdiction over Indian country by "any State not having jurisdiction," permitting new assumptions of jurisdiction only "with the consent of the Indian tribe." Similarly, Section 403(b), 25 U.S.C. 1323(b), re-

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[2] About the same time, the South Dakota legislature's last attempt at assuming jurisdiction over Indian country failed when it was defeated in a referendum vote by a 3 to 1 margin. Pet. App. A10-A11.

pealed Section 7 of Public Law 280 (which, as discussed above, had permitted assumption of jurisdiction by unilateral state action), but provided that the repeal "shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal."

5. Thereafter, in *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979), this Court addressed the permissibility of partial assumptions of jurisdiction under Public Law 280. That case involved a statute enacted by Washington—a State covered by the same Enabling Act as South Dakota and thus, like South Dakota, a disclaimer State subject to the provisions of Section 6 of Public Law 280. The statute in question asserted full criminal and civil jurisdiction over non-trust, fee lands within Indian country. With respect to other land in Indian country, the measure asserted jurisdiction over eight subject-matter areas, including such matters as operation of motor vehicles on highways, domestic relations, juvenile delinquency, and adoption proceedings. See 439 U.S. at 465 n. 1. The statute also provided that the State would assert full criminal and civil jurisdiction over Indian country at the request of the Tribe concerned.

This Court rejected the contention that Public Law 280 did not permit disclaimer States (such as Washington and South Dakota) to assume only a portion of the jurisdiction permitted by Public Law 280. It looked first to the language in Section 7 of Public Law 280, which "permits option States to assume jurisdiction 'in such manner' as the people of the State shall 'by affirmative legislative action, obligate and bind the State to assumption thereof.'" 439 U.S. at 495. This Court observed that "[o]nce the requirements of § 6 have been satisfied, the terms of

§ 7 appear to govern the scope of jurisdiction conferred upon disclaimer States." *Ibid.*

This Court further explained that a contrary conclusion would have been inconsistent with the purpose of Public Law 280:

> Section 6 * * * was essentially an afterthought designed to accomplish the limited purpose of removing any barrier to jurisdiction posed by state organic law disclaimers of jurisdiction over Indians. All option States were originally treated under the aegis of § 7. * * * Indeed, to the extent that the Tribe and the United States suggest that the disclaimer States stand on a different footing from all other option States, their argument makes no sense. It would ascribe to Congress an intent to require States that by force of organic law barriers may have had only a limited involvement with Indian country to establish the most intrusive presence possible on Indian reservations, if any at all, and at the same time an intent to allow States with different traditions to exercise more restraint in extending the coverage of the law.

439 U.S. 496-497.

But the Court did not resolve the case solely on the basis of this analysis. Instead, it explicitly stopped short of saying that all partial assumptions are permissible; it concluded only that the phrase " 'in such manner' * * * is at least broad enough to authorize a State to condition the extension of full jurisdiction over an Indian reservation on the consent of the tribe affected." This Court supported its conclusion by pointing out that the Washington scheme was particularly compatible with the law enforcement purposes of Public Law 280 because it did "not reflect

an attempt to reap the benefits and to avoid the burdens of the jurisdictional offer made by Congress." 439 U.S. at 498. Because the statute provided for complete assumption of jurisdiction at the Tribe's request, the Tribe had a remedy at hand if the partial assumption led to any practical difficulties in law enforcement; the Tribe could ask the State to assume full jurisdiction. *Id.* at 498-499.

6. In reliance on *Yakima*, the State of South Dakota concluded that, notwithstanding the 1964 decision of the South Dakota Supreme Court in *Hankins* and passage of the Indian Civil Rights Act of 1968, it was entitled to assert jurisdiction under the 1961 statute over conduct taking place on highways in Indian country. Respondents accordingly instituted this action in the United States District Court for the District of South Dakota. On March 31, 1989, that court granted the State's motion for summary judgment. First, relying on a recent decision of the South Dakota Supreme Court,[8] the court concluded that the 1961 statute was still in effect.

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[8] See *State* v. *Onihan*, 427 N.W.2d 365, 370 (S.D. 1988). *Onihan* did not clearly address the question whether, as a matter of state law, a statute invalidated as inconsistent with federal law is voided, or simply suspended, so that it automatically springs back into existence upon a change in federal law. A strong argument could be made, as a matter of South Dakota law, that after *Hankins* the 1961 statute was completely void and thus could not spring back into effect to justify jurisdiction after *Yakima*. See S.D. Codified Laws Ann. § 1-1A-1 (1985) ("every statute * * * of the state of South Dakota enacted * * * in contradiction to the provisions of the United States Constitution, and so judicially determined by a final judgment rendered by the South Dakota Supreme Court * * * is *void* within the jurisdiction of the state of South Dakota" (emphasis added)).

Pet. App. A79-A80. Relying on *Yakima* and its view of the policies underlying Public Law 280, the court concluded that the statute satisfied Public Law 280. Pet. App. A80-A94. Finally, the court rejected the contention that the State's resumed exercise of jurisdiction violated the Indian Civil Rights Act because it occurred without the Tribe's consent. *Id.* at A95-A104. The court reasoned that the Indian Civil Rights Act expressly stated that it would have no effect on jurisdiction that already had been assumed, and that the consent requirement set forth in Sections 1321 and 1322 applied only to new assumptions of jurisdiction after 1968. Because South Dakota had assumed jurisdiction in 1961, the Indian Civil Rights Act did not apply. *Id.* at A102-A104.

On appeal, the court of appeals reversed. First, it concluded that the 1961 statute did not comply with Public Law 280. The court distinguished *Yakima* in two ways. First, the Washington statute upheld in *Yakima* provided that the State would assume full jurisdiction upon the request of the tribe involved. Therefore, the Washington statute could not be construed as "an attempt to reap the benefits and to avoid the burdens of the jurisdictional offer made by Congress." Pet. App. A22 (quoting *Yakima*, 439 U.S. at 498). By contrast, the court reasoned, the South Dakota scheme takes jurisdiction only over the area most likely to generate significant revenues—enforcement of traffic laws—and conditions assumption of full jurisdiction on federal reimbursement. *Id.* at A25. Second, the court concluded that the South Dakota statute did not adequately advance the purposes of Public Law 280, because such a limited assumption of jurisdiction would not significantly limit reservation lawlessness or reduce the federal presence on the reservation. *Id.* at A26-A28.

As an alternative basis for its holding, the court concluded that South Dakota's "retroactive application of a new statutory interpretation," put into effect without tribal consent, violated the requirement of consent set forth in the Indian Civil Rights Act of 1968. Pet. App. A29. It ruled that Congress intended to "eliminate completely the ability of a state to assume jurisdiction, without tribal consent, at any time and in any manner after 1968." *Id.* at A33. The tribes therefore had a vested right in the tribal consent requirement that precluded the retroactive application of the *Yakima* construction of Public Law 280 to validate the 1961 assertion of jurisdiction. *Id.* at A43.

DISCUSSION

In our view, the correct answers to the questions presented by the court of appeals' decision are open to debate, but there is no reason for this Court to decide these questions. This case is entirely unique; it involves purely historical questions regarding a statute repudiated by Congress more than two decades ago. Moreover, reversal of the decision below and disturbance of the status quo on the South Dakota reservations would call into question convictions secured by the United States in the reasonable belief that South Dakota did not have jurisdiction.

1. The State's first contention is that the court of appeals misapplied this Court's decision in *Yakima*. At the heart of the court of appeals' decision on this point was its conclusion that this case should be treated differently because South Dakota's offer to assume jurisdiction was not nearly as broad as the offer at issue in *Yakima*. As the court's opinion demonstrates, Pet. App. A20-A24, certain passages in the *Yakima* opinion support this reading. The

most important of these appear in the last three paragraphs of Part IV of the *Yakima* opinion, 439 U.S. at 498-499, in which this Court responded to the United States' contention that the partial assumption of jurisdiction under the Washington statute was inconsistent with the purposes of Public Law 280. As we discussed above, pp. 6-7, this Court did not reject the United States' argument outright, but instead explained that in its view the Washington statute *did* fulfill the purposes of Public Law 280 because, among other things, it provided that the State of Washington would assume full jurisdiction upon the request of the Tribe.

We agree with the court of appeals' conclusion that the South Dakota statute is less compatible with Public Law 280 than Washington's statute was. South Dakota's assumption of nothing more than highway jurisdiction—which might be thought to finance itself—without any of the more burdensome types of jurisdiction assumed by Washington in *Yakima* (such as domestic relations and juvenile delinquency) suggests that the State here, unlike Washington in *Yakima*, is in a position to "reap the benefits and to avoid the burdens of the jurisdictional offer made by Congress," *Yakima*, 439 U.S. at 498. Moreover, because the State is not offering to assume full jurisdiction upon the Indians' request, any practical problems caused by this partial assumption will remain in effect indefinitely.

On the other hand, it is by no means clear that these portions of the opinion were necessary to the holding. *Yakima* can be read, rather, to turn solely on the Court's interpretation of the statutory language, rather than its views as to the closeness of the fit between the Washington statute and the goals of

Public Law 280. Read from this perspective, *Yakima* would represent a conclusion that Section 7 of Public Law 280 comprehensively permitted partial assumptions of jurisdiction "in such manner as the people of the State shall" provide. Under this reading, there would be no need for courts to engage in a case-by-case analysis of the extent to which particular state statutes are compatible with the policies of the 1953 federal statute.

This reading of *Yakima*, though, effectively would render superflous the passages discussed above, in which the Court justified the Washington statute as substantially furthering the overall policies of Public Law 280. In sum, the *Yakima* opinion does not clearly resolve the issue presented by this case — which is essentially whether *Yakima* validates *all* partial assumptions, or only those not demonstrably incompatible with the policies of Public Law 280. The latter interpretation is, in our view, the one more in keeping with the Court's settled practice of strictly construing statutes that terminate tribal authority or transfer it to the States, see *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986); *Solem* v. *Bartlett*, 465 U.S. 463, 470-472 (1984); *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 412-413 (1968), and with the special rules governing preemption of state authority over Indian reservations, see, *e.g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332-336 (1983); *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 176-177 (1989). Accordingly, we believe the court of appeals correctly concluded that the rule of *Yakima* does not properly extend to the much more extremely selective assumption of jurisdiction at issue here and, hence, that the 1961 state statute was not an effective assumption of jurisdiction under Public Law 280.

2. The second question raised by the State challenges the court of appeals' alternative holding that, even if South Dakota's 1961 statute validly assumed jurisdiction at that time, it cannot be resuscitated without tribal consent after enactment of the Civil Rights Act of 1968. Like the first question, this raises a unique issue to which the answer is not entirely clear.

We may assume *arguendo* that *Yakima* would be treated as fully retroactive in the sense that the South Dakota decision in *Hankins* would be regarded as having been incorrect even in 1964 and that *Hankins* did not invalidate the state statute, but only suspended its effect until this Court undermined the *Hankins* analysis in *Yakima*, see discussion, p. 7 & n.3, *supra*. But even so, it remains unclear whether the state statute could be given effect under *federal* law—as manifesting a valid assumption of jurisdiction under Public Law 280—after passage of the Civil Rights Act of 1968.

It is true that Section 404(b) of the 1968 Act, 25 U.S.C. 1323(b), provides that the 1968 Act does not "affect any cession of jurisdiction made pursuant to [the former Section 7] prior to its repeal." But this does not necessarily resolve the question. In light of the practical and legal circumstances that existed in 1968—the South Dakota Supreme Court in 1964 had held the state statute invalid under federal law, South Dakota therefore was not in fact exercising any jurisdiction over offenses by or against Indians from 1964 to 1968, and representatives of South Dakota specifically informed Congress while it was considering the 1968 Act that the State was not exercising and did not then have power to exercise such

jurisdiction[4]—there is a substantial argument that in 1968 South Dakota was a State "not having jurisdiction" over offenses by or against Indians on highways in Indian country, as described in 25 U.S.C. 1321(a), and that it thereafter could acquire such jurisdiction only with the consent of the Tribes concerned.

At bottom, the question is whether when Congress referred to States "having jurisdiction," it was using the term in a narrow technical sense (asking whether the State might at some point be held to have had the theoretical power to decide cases and enforce its judgments) or in a more practical sense (asking whether the State was recognized as having jurisdiction and actually was devoting enforcement and prosecutorial resources to the exercise of that jurisdiction). Although at first blush the narrower reading of the term may seem more natural, there are substantial arguments to the contrary. The reference to jurisdiction in the 1968 statute amending Public Law 280 surely should be interpreted in light of the requirements of Section 7 of Public Law 280 itself, which authorized state assumption of jurisdiction only if the people "shall * * * obligate and bind the State to assumption thereof." It is difficult to conclude that South Dakota was obligated and bound to assumption of jurisdiction in 1968, when the highest court of that State had held its assumption invalid four years previously and the State was not exercising jurisdiction because of its belief that it did not have jurisdiction.

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[4] See, *e.g.*, *Constitutional Rights of the American Indian: Hearings Before the Subcomm. on Constitutional Rights to the Senate Comm. on the Judiciary, S.961, S.962, S.963, S.964, S.965, S.966, S.967, S.968, and S.J. Res. 40*, 89th Cong., 1st Sess. 117 (1965) (statement of South Dakota Assistant Attorney General); *id.* at 16 (statement of Senator McGovern). For a detailed discussion, see Br. in Opp. 11-13.

This position is buttressed by the uncontradicted views presented to Congress in 1968 that South Dakota was not one of the States that had assumed jurisdiction under Public Law 280.[5] In light of the canon that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 766 (1985), we believe the court of appeals was correct in concluding that the 1968 Act's requirement of tribal consent properly applies to the unusual circumstance of subsequent reinstitution of state authority presented here.

3. Whatever the correct view of the merits of the case, practical considerations strongly suggest that this case does not warrant further review. Most importantly, the situation in South Dakota is unique, so a decision by this Court would be unlikely to provide substantial guidance to any other jurisdiction. On this point, we disagree with the State's suggestion, Pet. 14-15, that three other States have similar partial assumption statutes that the rationale of this case would govern.[6] The first of these, Arizona, is

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[5] See Pet. App. A32-A33; Br. in Opp. 11-13.

[6] Although petitioner does not address it, Nebraska apparently has adopted a jurisdictional scheme similar to that of South Dakota over the Omaha Indian Reservation through a retrocession of jurisdiction accepted by the Secretary of the Interior under 25 U.S.C. 1323(a). Litigation over the validity of that retrocession ended almost twenty years ago. See *Omaha Tribe* v. *Village of Walthill*, 334 F. Supp. 823 (D. Neb. 1971), aff'd per curiam, 460 F.2d 1327 (8th Cir. 1972), cert. denied, 409 U.S. 1107 (1973). Because Nebraska was one of the jurisdictions *required* to accept jurisdiction under Public Law 280, this partial assumption was accomplished through the discretionary acceptance of a retrocession by the Secretary of the Interior, exercised at the behest of the Tribe. Thus, clarification of the law with respect to South Dakota

said to have exerted jurisdiction over air pollution. In light of the Court's holdings that Public Law 280 does not grant general authority to exercise regulatory jurisdiction over Indian country, see *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 207-208 (1987); *Bryan* v. *Itasca County*, 426 U.S. 373, 383-390 (1976), the validity of Arizona's claim is subject to serious doubt for reasons not implicated here. Moreover, this scheme is likely to change in the immediate future, because the 1990 Amendments to the Clean Air Act have granted the Administrator of the EPA authority to determine whether States or Indian tribes should exert Clean Air authority on reservations. Act of Nov. 15, 1990, Pub. L. No. 101-549, § 107, 104 Stat. 2464-2465. The other two States, Montana and Iowa, have regimes dramatically different from the South Dakota scheme before this Court. Montana has exterted full criminal jurisdiction over the Flathead Reservation, Iowa full civil jurisdiction over the Sac and Fox Reservation. Because, unlike South Dakota, these States have not carved out particular subject matters over which to accept jurisdiction, their statutes do not have the defects the Eighth Circuit identified in the South Dakota statute. Finally, we are aware of no other assumption statute declared invalid by a lower court before 1968 and sought to be resuscitated in light of *Yakima*. Thus, any attention the Court may give to this point would be unlikely to have application to any other case.

Furthermore, as we have discussed above, pp. 4-5, the policies Congress was pursuing when it enacted

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would not affect the situation in Nebraska; because the Tribe has consented to the jurisdictional situation, Nebraska's situation is much closer to *Yakima* than the case at hand.

Public Law 280 in 1953 do not comport with its goals under current federal Indian policy. In particular, Congress explicitly has rejected the portion of Public Law 280 on which South Dakota relies here, which allows a State, without the consent of the affected Indians, to assume jurisdiction over offenses by or against Indians in Indian country. Whatever the technical merits of the court of appeals' decision, the bottom line of the decision, which prevents South Dakota, without the consent of the affected Tribes, from assuming jurisdiction it did not claim to have and was not exercising as of 1968, is consistent with current federal Indian policy as embodied in the 1968 Act. In sum, there is no need for the Court in this unique case to undertake to ascertain the intent Congress had under a 1953 statute when the only effect a reversal could have would be to undermine the policy Congress has expressed in more recent statutes.

The decision below leaves no jurisdictional void. The United States will continue to have jurisdiction over crimes committed by or against Indians on reservation highways in South Dakota, as elsewhere in Indian country in that State; the Tribes will continue to have concurrent jurisdiction over crimes committed by their members; and the State will continue to have jurisdiction over crimes committed by non-Indians that do not involve Indian victims. If any inefficiencies appear in this allocation of authority, the federal government, the Tribes, and state officials may enter into cross-deputization agreements, as they have before.

We note that the United States has taken its responsibility seriously. For example, we have been advised by the office of the United States Attorney for the District of South Dakota that since 1988 the United States has secured at least 30 convictions for

involuntary manslaughter on the highways in South Dakota Indian country, as well as an unspecified number of convictions for murders, assaults, and rapes. Similarly, the Tribes have sought vigorously to enforce laws against drunk driving; as the record in this case shows, in the three years preceding this lawsuit 901 citations were issued by tribal officers for driving under the influence. C.A. App. 806-807. Reexamination of this status quo would cast a shadow on the past federal criminal convictions in South Dakota.[7] Moreover, if the Court were to accept South Dakota's claim that it has exclusive criminal jurisdiction over those highways, see Pet. 39-46, it would call into question the validity of all convictions since 1961, even convictions secured by the Tribes.[8]

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[7] It is not clear that assumption of jurisdiction by South Dakota would have ended federal jurisdiction, because the effect on federal jurisdiction of an option State's assumption of jurisdiction under Public Law 280 is unclear. Public Law 280 expressly provides that federal jurisdiction no longer applies in areas where jurisdiction was ceded to mandatory States. See 18 U.S.C. 1162(c). The absence of any such provision with respect to option States supports an argument that federal jurisdiction would continue even after the State assumed jurisdiction. See *United States* v. *High Elk*, 902 F.2d 660 (8th Cir. 1990) (per curiam) (reaching this result). But the structure of Public Law 280 and the general disaffection Congress has expressed with concurrent state-federal jurisdiction over Indian country can support substantial arguments to the contrary. See Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 549-550 (1976) (arguing that assumption of Public Law 280 jurisdiction by option States ends federal jurisdiction).

[8] We disagree with the State's argument on this point. Nothing in Public Law 280 suggests it was intended to divest the tribes of their inherent criminal jurisdiction. In light of Public Law 280's express statement that assumption of juris-

Finally, we point out that the South Dakota Supreme Court has acceded to the decision of the Eighth Circuit in this case. See *South Dakota* v. *Spotted Horse*, No. 16644 (Oct. 4, 1990), Br. in Opp. App. 8a-9a.[9] Accordingly, there is no remaining likelihood that the state and federal judicial systems will render contrary decisions on this point. Cf. *Solem* v. *Bartlett*, 465 U.S. at 466 (suggesting that this Court granted certiorari to settle such a conflict).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

EDWARD J. SHAWAKER
ANNE S. ALMY
Attorneys

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diction by the States would divest the United States of jurisdiction, see 18 U.S.C. 1162(c), congressional silence on this point strongly suggests that tribal jurisdiction remains intact. See *Walker* v. *Rushing*, 898 F.2d 672, 675 (8th Cir. 1990).

[9] A petition for a writ of certiorari, No. 90-1003, is pending in this Court seeking review of that decision. For the reasons discussed in this brief, we believe the petition in that case also should be denied.

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NO. 90-749

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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF SOUTH DAKOTA, GEORGE S. MICKELSON, GOVERNOR, MARK BARNETT, ATTORNEY GENERAL, JIM JONES, SUPERINTENDENT, HIGHWAY PATROL, IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

ROSEBUD SIOUX TRIBE, CHEYENNE RIVER SIOUX TRIBE, OGLALA SIOUX TRIBE, STANDING ROCK SIOUX TRIBE,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF STATE OF SOUTH DAKOTA

MARK BARNETT
ATTORNEY GENERAL
State of South Dakota
Counsel of Record

John P. Guhin
Deputy Attorney General
500 East Capitol
Pierre, SD 57501-5070
Telephone: (605) 773-3215
Counsel for Petitioners

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NO. 90-749

IN THE

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UNITED STATES

OCTOBER TERM, 1990

STATE OF SOUTH DAKOTA, GEORGE S. MICKELSON, GOVERNOR, MARK BARNETT, ATTORNEY GENERAL, JIM JONES, SUPERINTENDENT, HIGHWAY PATROL, IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

ROSEBUD SIOUX TRIBE, CHEYENNE RIVER SIOUX TRIBE, OGLALA SIOUX TRIBE, STANDING ROCK SIOUX TRIBE,

Respondents.

INTRODUCTION

This brief constitutes the response of the State of South Dakota to the Opposition to Petition for Writ of Certiorari filed by the Respondent Indian Tribes (Opposition) and to the Brief for the United States as Amicus Curiae (Amicus Curiae).

At issue is whether the State successfully assumed Public Law 280 jurisdiction over Indians on highways through Indian country in South Dakota in 1961 and whether it retains that jurisdiction to this day. The highways involved include South Dakota Highways 20, 34, 44, 63 and 85 and U.S. Highways 12, 18, and 212. The highways at stake, especially the federal and state highways, are vital arteries of intra- and interstate commerce.

Recognition of State jurisdiction over tribal members on reservation highways would allow the State to deal with the appalling fatality rate countenanced by the tribes and the United States on roads through the reservations. Statistics presented to the courts below indicate that the ten year highway fatality average for reservation counties is far in excess of that of the rest of the State. South Dakota experienced a

statewide ten year fatality rate of 2.98 per 100 million miles travelled in 1977-86. In contrast, Dewey and Ziebach Counties on the Cheyenne River Reservation had fatality rates of 8.02 and 7.02, or approximately two and one-half times the State average. Todd County, on the Rosebud Reservation, had a ten year fatality rate of 10.25, or in excess of three times the State average. Shannon County, on the Pine Ridge Reservation, had a ten year fatality rate of 17.01, or approximately five and one-half times the State average. (See Affidavit of Pat Winters.) The federal resistance to this Petition for Certiorari is not justified by any concern for the health and safety of reservation residents when it is considered that state law enforcement could bring reservation fatality rates more in line with non-reservation rates.

The position of the United States in this case is likewise problematic when it is considered that it is contrary to that taken before the Eighth Circuit Court of Appeals in Woehl v. United States, No. 87-5386 S.D. (Brief of the United States filed December 21, 1988). In Woehl, the United States took the view that there was "no doubt" that South Dakota had successfully assumed jurisdiction over Indians on highways to Indian country in 1961, and had retained that jurisdiction ever since. See id. at 22. The case was settled but the United States either does not or cannot reconcile its two positions.

The position of the United States is, finally, difficult to understand given the concessions of the United States as to the merits of the State's argument. See Brief of the United States as Amicus Curiae, State of

South Dakota v. Rosebud Sioux Tribe, No. 90-749, pp. 9, 10-11, 12.

In any event, the State submits that it did successfully assume partial Public Law 280 jurisdiction over highways in 1961, that that assumption of jurisdiction was consistent with Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979), and that the plain language of the savings clause in the 1968 Indian Civil Rights Act, 25 U.S.C § 1323(b) prevents any argument that the State lost jurisdiction through that Act.

NEITHER THE RESPONDENT NOR THE UNITED STATES HAS STATED SUFFICIENT REASONS FOR DENYING THE WRIT.

A. The Proper Standard For Judging Whether South Dakota's Assumption of Jurisdiction Was Valid Has Been Ignored Below.

This Court in Yakima, 439 U.S. at 497, unambiguously set out the standard for

argument here than in any reservation disestablishment or diminishment case and the argument deserves to be rejected.

E. The Position of the United States is Inconsistent.

The United States as Amicus Curiae neglects to point out that the position taken in the brief before this Court is contrary to the previous position taken by the United States in the United States Court of Appeals for the Eighth Circuit. In Woehl v. United States, No 87-5386 S.D. (Brief of United States, filed December 21, 1988), the United States argued that South Dakota had assumed jurisdiction over roads on the reservation, that its assumption of jurisdiction was immediately effective, and that it was "unaffected by subsequent South Dakota legislation, by the 1964 referendum, and by the Civil Rights Acts of 1968. It has never been removed by Congress." Id. at 21. The

United States said further that Yakima and Onihan[2] "left no doubt that South Dakota's limited assumption of jurisdiction over criminal and civil matters arising on highways on Indian reservations was valid in 1961 and has remained so ever since." Id. at 21-22.[3]

The unexplained inconsistency of the position of the United States in Woehl and in

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[2]In State v. Onihan, 427 N.W.2d 865 (S.D. 1988), the South Dakota Supreme Court determined that the State had successfully assumed jurisdiction in 1961 and had retained it to the present. After the Eighth Circuit's decision in Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164 (8th Cir. 1990), the state court, virtually without any independent analysis, reversed itself. State v. Spotted Horse, No. 16644 slip op. (S.D. Oct. 4, 1990), petition for cert. pending, No. 90-1003.

[3]This action as settled before argument and no circuit court opinion was issued in Woehl.

p. 794. The Tribe also indicated that approximately "one-third of all arrests are for traffic related offenses." Id. Thus, the RST law enforcement budget is in the range of $150,000-$200,000 for traffic offenses by its own admission.

Clearly, income will run far below the costs of exercising jurisdiction. South Dakota itself estimated a total increase in costs from additional state troopers in Todd County alone of $140,000 per year. Additional costs to the state will include that of court appointed lawyers, the cost of jailing or imprisoning offenders, the costs of probation officers and similar costs.

Amicus Curiae also argues that South Dakota's assumption of jurisdiction is less compatible with Public Law 280 than was the Washington's because South Dakota did not assume burdensome types of jurisdiction

"such as domestic relations and juvenile delinquency." Amicus Curiae, p. 10.

Congress has made clear that matters involving children are at the heart of tribal culture. Indian Child Welfare Act of 1978, 25 U.S.C. § 1901-1963. South Dakota suggests that the United States' insistence upon an intrusive assumption of jurisdiction in the area of domestic relations is inconsistent with Yakima, 439 U.S. at 497, which endorsed "responsible and sensitive" assumptions of jurisdiction and with § 7 of Public Law 280 which comprehensively permitted partial assumptions of jurisdictions "in such manner as the people of the state shall" provide.

C. The Indian Civil Rights Act of 1968 Expressly Preserved any "Cession" of Jurisdiction Previously Made and Thus Cannot be Read to Deprive South Dakota of Jurisdiction Taken in 1961.

Neither the Tribes nor the United States deals satisfactorily with section 404(b) of the Indian Civil Right Act of 1968, 25 U.S.C.

State Assistant Attorney General Andre, three years before the passage of the 1968 Indian Civil Rights Act, concentrated his comments on the attempt by South Dakota in 1963 to assume total jurisdiction and did not spend much time analyzing the 1961 assumption of jurisdiction at issue here. As to the 1961 legislation, Andre in effect stated that the South Dakota Supreme Court declared the 1961 bill "invalid" because "piecemeal jurisdiction" could not be taken consistently with congressional intent. See Hearings on S. 961-S. 968 Before the Subcommittee on Constitutional Rights, Senate Judiciary Committee, 89th Cong., 1st Sess. 118. This Court, however, was ultimately to find that in Yakima "piecemeal jurisdiction" could be taken consistently with congressional intent. In essence, the United States urges this Court to find that a state assistant attorney general's erroneous interpretation of Public

Law 280 should control over this Court's later holding in Yakima.

Senator McGovern's statement is of little assistance because it does not address at all the 1961 assumption of jurisdiction at issue here but only the attempt in 1963 to assume total jurisdiction. See id. at 15-16.

Finally, it is distressing that the argument made in this case is parallel to the failed argument of the United States in Yakima. The United States argued in Yakima that certain statements in committee dictated the result that the State of Washington would be compelled to amend its constitution before assuming under Public Law 280. See Brief of United States as Amicus Curiae, Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, No. 77-388, reprinted at South Dakota District Court Appendix Vol. 2, p. 493 et seq. In particular, the United States in the Yakima litigation pointed to the

statement of Congressman Westland of Washington which expressly referred to the situation in his state:

> I believe the state of Washington was consulted on this matter and they indicated their readiness to take over on this jurisdiction as far as criminal and civil was concerned but they do have a constitution there that requires this amendment in order that they can get at it.

Id. at 529.

The Representative from Washington thus announced that his home state would have to amend its constitution before assuming jurisdiction. Senator Case of South Dakota, the apparent sponsor of the bill in the Senate, agreed, according to the Brief of the United States. Id., p. 531.

This Court found, in the face of these arguments, that

> while some committee members apparently thought that § 6 states, as a matter of state law, would have to amend their constitutions in order to remove the disclaimers

> found there, there is no indication that the committee intended to impose any such requirement.

Washington v. Yakima Indian Nation, 439 U.S. at 492-493. The misapprehension of certain members of Congress of the state of the law did not persuade this Court to adopt that misapprehension. The same should be true here. See also Yakima, 439 U.S. at 493 n.40.[1]

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[1]Likewise, the United States in Yakima attempted to rely upon misapprehensions regarding whether Public Law 280 as originally enacted allowed piecemeal jurisdiction. It cited, for example, the statement of Congressman Aspinall, the Chairman on the Committee on Interior and Insular Affairs, to the effect that "authorization for partial jurisdiction was a change in the law." Brief of the United States, South Dakota District Court Appendix Vol. II, p. 583. See also, id. at 582. (Statement of Sen. Ervin). Likewise, the holding of the South Dakota Supreme Court in Hankins, rejecting piecemeal jurisdiction was relied upon by the United States. Id. at 559, 579, 584 and 588. Nonetheless, this Court did not adopt the erroneous 1964-68

(Footnote Continued)

D. Practical Considerations Strongly Suggest This Case Warrants Further Review.

The most critical practical consideration in determining whether this case merits certiorari is one completely ignored by Amicus Curiae and one treated with contempt by Respondents. See Opposition p. 9, n.26. This practical effect is the continuation of the extremely high fatality rate on highways on reservations in South Dakota. South Dakota developed and submitted the statistics to the courts below which show ten year fatality rates of from two and one-half to five times the State average on the Indian reservations studied. These statistics demonstrate that the tribes and federal government have failed to protect both

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(Footnote Continued)
view that piecemeal jurisdiction was not allowable under the Act.

Indians and non-Indians who travel the highway in question. In this light, it seems that the United States should urge this Court to accept the state's claims and thus provide protection for Indians on reservation roads.

Moreover, it might be noted that the statistics are not surprising, for no tribe has made any claim to the courts in this matter of any actual conviction rates or has demonstrated, for example, that any person was ever jailed for a driving while intoxicated offense.

Second, from a practical perspective, and despite the protestations of the United States, the Eighth Circuit's opinion does undermine the piecemeal jurisdiction taken in Arizona, Montana and Iowa.

Finally, the United States at the last moment raises the spectre, without citation of authority, of voiding past federal criminal convictions. There is no more of an

determining whether a state has successfully assumed jurisdiction under Public Law 280:

> The drafters were primarily concerned with establishing a general transfer scheme that would facilitate, not impede, future action by other states willing to accept jurisdiction.

The essence of this position of both the Respondents and Amicus Curiae is to the contrary--that Congress intended to set up a system which would "impede" not "facilitate" action by other states willing to accept jurisdiction.

B. Legislation Enacted by South Dakota in 1961 Complied With Public Law 280 As Construed By This Court in Yakima.

Both the Respondents and the United States contend that South Dakota's 1961 legislation did not comply with Public Law 280. The Respondents' argument is simply an ipse dixit. Opposition, pp. 9-10. Amicus Curiae argues that the South Dakota statute is "less compatible with Public Law 280 than the

Washington statute was." Amicus Curiae p. 10. Amicus Curiae contends that this is so because South Dakota assumed only highway jurisdiction, stating that it "might be thought to finance itself. . . ." Id. It is clear, however, the taking of highway jurisdiction on a poverty stricken reservation will not finance itself. According to one of the tribes engaged in this litigation, the Rosebud Sioux Tribe, the money actually collected for violation of tribal traffic laws in Todd County in 1985 and 1986 was approximately $27,000 and $48,000. See Rosebud Sioux Tribe Answers to Interrogatories, South Dakota District Court Appendix III, p. 792, 793. The total budget for law enforcement for the Police Department of that Tribe "for 1984 was $509,632, 1985 was $752,000 and 1986 was $665,600." RST Answers to Interrogatories, South Dakota District Court Appendix III,

1323(b) which expressly provides that the 1968 Act shall not "affect any cession of jurisdiction made pursuant to said section prior to its repeal."

This unambiguous language requires that if a "cession" had been made prior to the Act it was preserved. In South Dakota's case the cession was consummated when the state legislature adopted SL 1961, ch. 164, effective on July 1, 1961. The plain language of the statute requires a finding that the 1968 legislation could not affect the prior session of jurisdiction.

As this Court recently stated:

> The purpose of a statute includes not only what it seeks to change, but what it resolves to leave alone. (Citation omitted.) The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President.

West Virginia University Hospital, Inc. v. Casey, 59 U.S.L.W. 4180, 4184 (1991).

Here, the plain statutory text "resolves" to leave alone the previously made "cession" of jurisdiction to South Dakota. To avoid application of the plain meaning of the statute, the United States, and the Respondents, contrary to Casey, have engaged in a unimpressive search for any snippet of legislative history that would allow a finding contrary to that language. The two portions of this legislative history cited (but not quoted) by the United States include a statement of an assistant attorney general of South Dakota in 1965, Amicus Curiae, p. 13 n.4, and a 1965 statement of Senator McGovern. Both of the citations are to statements made to a congressional committee three years before the passage of the bill; neither was made part of any official report. See generally Pierce v. Underwood, 108 S.Ct. 2541, 2550- 2551 (1988). Neither statement can be given weight in view of its content.

this case undermines the present argument of the United States.

CONCLUSION

In view of the high fatality rate on highways through reservations in South Dakota, including several state and federal highways and in view of the inconsistency of the decision of the Court of Appeals with decisions of this Court, South Dakota respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

MARK BARNETT
Attorney General of
South Dakota
Counsel of Record

John P. Guhin
Deputy Attorney General
Mark Smith
Assistant Attorney General